No. 75-1678

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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FEDERAL POWER COMMISSION, PETITIONER

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-13a) is reported at 522 F.2d 1345. The initial order of the Federal Power Commission (App. D, *infra*, pp. 20a-24a), and its order denying rehearing (App. F, *infra*, pp. 27a-36a), are not yet reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 14a-17a) were entered on November 14, 1975. The Commission's timely petition for rehearing was denied on January 20, 1976 (App. C, *infra*, pp. 18a-19a). On April 12, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including May 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Federal Power Commission is required under the Natural Gas Act to impose, in certain circumstances, proposed compensation schemes whereby high-priority pipeline customers would make payments to low-priority customers in full or partial compensation for the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries.

STATUTES INVOLVED

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 1(b), 15 U.S.C. 717(b):

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 4(a) and (b), 15 U.S.C. 717c(a) and (b):

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of

any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

STATEMENT

1. On August 5, 1974, respondent Mississippi Public Service Commission filed on behalf of certain electric utilities in Mississippi [1] a petition for extraordinary relief from the natural gas curtailment plan of United Gas Pipe Line Company. The petition requested the Commission to "initiate a proceeding to establish a method by which the electric utilities are [financially] compensated for the additional costs of replacement fuel they are required to use as a result of having been placed in the lowest priority of curtailment" (C.A. App. 3).[2]

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[1] The electric utilities are Mississippi Power Company, respondent Mississippi Power and Light Company, and South Mississippi Electric Power Association.

[2] "C.A. App." refers to the joint appendix in the court of appeals.

Under United's curtailment plan, the electric utilities were assigned the lowest priority in recognition of the inferior use of natural gas as boiler fuel in the generation of electricity. As the court of appeals observed, the use of natural gas as boiler fuel is deemed inferior because it is the least efficient

The Commission, concluding that it "lack[ed] * * * jurisdiction to grant the requested relief" (App. D, *infra*, p. 22a), denied the petition (*id.* at 20a-24a). It reasoned that "requir[ing] certain high priority jurisdictional customers [of a pipeline] to pay rates which included an increment to compensate other customers for their costs of alternate fuel" would necessarily result in the payment of rates and charges that are not "based upon the pipeline's cost of service plus a reasonable rate of return" and therefore not "just and reasonable" under Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a) (App. D, *infra*, p. 22a).

Moreover, because the Commission's rate jurisdiction is limited to sales of gas in interstate commerce *for resale*, it would have "no jurisdiction whatsoever over the rates which are charged by pipelines for their sales of gas to direct industrial customers" who, like the Mississippi electric utilities, do not buy it for resale (*id.* at 23a). Consequently, there would be "no means whereby [the Commission] could insure that low priority direct industrial customers * * * would be 'compensated' for their costs of alternate fuel" (*ibid.*).

Finally, the Commission viewed the Public Service Commission's petition, at bottom, as "nothing more than an attempt to obtain damages because of

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use of such fuel and because customers using gas for this purpose are better able to convert to alternate fuels (App. A, *infra*, p. 5a, n. 7).

United's inability to deliver its full contractual commitment" (*ibid.*). But "a pipeline's damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court" (*ibid.*).

2. The Commission thereafter denied applications for rehearing (App. F, *infra*, pp. 27a-36a). In its order denying rehearing, the Commission incorporated the analysis contained in two orders previously entered in a similar but unrelated case, in which the Commission had explained why "such compensation schemes are unacceptable as a matter of law and policy" (*id.* at 29a).[3] The Commission summarized its reasoning in those orders as follows (*ibid.*):

> [A] compensation scheme would allow higher rates unrelated to the pipelines' cost of service plus a reasonable rate of return; foster discriminatory rates among groups of consumers contrary to Section 4 of the Natural Gas Act; and

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[3] The two orders were issued in *Transcontinental Gas Pipe Line Corp.*, Docket No. RP 72-99, and are reproduced as Apps. G and H, *infra*, pp. 37a-72a and 73a-102a, respectively. On petitions for review in the *Transcontinental* case, the United States Court of Appeals for the District of Columbia Circuit entered an order directing the Commission to investigate the pipeline's supply situation and to report to the court within 30 days. On January 19, 1976, this Court vacated that order and remanded the case to the court of appeals for further proceedings. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584. The court of appeals thereafter remanded the case to the Federal Power Commission for the development of a record on the pipeline's supply situation (App. I, *infra*, pp. 103a-119a). See pp. 14 and 16, *infra*.

cause overall results which are inconsistent with equity and the public interest. * * *

3. The court of appeals set aside the Commission's orders and remanded for further proceedings (App. A, *infra*, pp. 1a-13a). The court recognized that, because of the statutory limitations on the Commission's rate jurisdiction and the standards governing its review of natural gas rates, compensation schemes would be unlawful and beyond the Commission's authority to approve if the payments were properly characterized as rates or rate changes (*id.* at 10a). The court had a single answer: "compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans" (*ibid.*). "[T]he basis for the imposition of such charges," the court held, "is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission" (*ibid.*).

It followed from the court's analysis that the Commission could impose these "surcharges" as a "condition for the receipt of higher priority gas" (*id.* at 12a), without applying the statutory "just and reasonable" rate standard and without concern for whether the payments would constitute "discriminatory rates" (*id.* at 10a). Similarly, since only the Commission's *rate* jurisdiction is limited to sales for resale, the court concluded that its characterization of the compensation payments as "surcharges" an-

swered the Commission's argument that "a system of compensation would require it to exercise rate-making authority over direct sale customers" (*id.* at 11a).

Finally, the court rejected the contention that payments made by one customer to compensate another for the receipt of gas would amount to "sales for resale requiring certification and tariff filing" under Sections 4 and 7 of the Act (*id.* at 11a). "[W]e do not find such payments to be sales in any realistic sense of the word" (*ibid.*).

The court, "intimat[ing] no view one way or the other as to whether compensation should be included," remanded the matter to the Commission to "make findings supported by an adequate record, relating to the inclusion or failure to include compensation as a part of a curtailment plan" (*id.* at 12a).

REASONS FOR GRANTING THE WRIT

1. The compensation issue presented by this case is of substantial importance in the administration of the Natural Gas Act. The Federal Power Commission interprets the statute to foreclose the imposition of any scheme whereby high-priority customers under a pipeline's curtailment plan are required, as a condition of receiving natural gas deliveries, to make additional payments for the benefit of low-priority customers whose deliveries are curtailed. The court of appeals has held, by contrast, that the Act does not preclude the imposition of such a compensation scheme and indeed requires the Commission to impose such a scheme if necessary "to insure that the

burdens of curtailment are spread evenly and equitably among those affected by such plans" (App. A, *infra*, p. 10a).

The effect of the court of appeals' decision, as we understand it, would be to require a general restructuring of pipeline rates for sales of natural gas on the basis of factors other than those that have long governed the Commission's determination of justness and reasonableness. If, as we believe, the court of appeals' interpretation of the statute is in error, prompt correction of that error will avert a spate of unnecessary administrative and judicial litigation over the merits of particular compensation schemes proposed in connection with each pipeline's curtailment plan.[4]

[4] Compensation schemes have been sought in the following administrative proceedings before the Federal Power Commission: *Panhandle Eastern Pipeline Company*, Docket No. RP71-119; *Texas Gas Transmission Corporation*, Docket No. RP72-64; *Columbia Gas Transmission Corporation*, Docket No. RP72-89; *Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99; *Mississippi River Transmission Corporation*, Docket No. RP73-6; *Consolidated Gas Supply Corporation*, Docket No. RP73-115; *Southern Natural Gas Company*, Docket No. RP74-6; *Northwest Pipeline Corporation*, Docket Nos. RP74-49 and RP76-34.

The Commission's rejection of compensation schemes has been challenged in the following court cases: *Cascade Natural Gas Corporation* v. *Federal Power Commission*, C.A. D.C., No. 75-1455; *Consolidated Gas Supply Corporation* v. *Federal Power Commission*, C.A.D.C., No. 75-1324; *Elizabethtown Gas Company* v. *Federal Power Commission*, C.A. D.C., No. 75-1767; *Transcontinental Gas Pipe Line Corporation, et al.* v. *Federal Power Commission*, C.A.D.C., Nos. 74-2036, *et al.*

In its recent opinion in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584, decided January 19, 1976—another case in which the Commission rejected as unlawful a proposed curtailment compensation scheme—this Court, while not reaching the merits of the Commission's action, noted "the potential importance of a resolution on the merits of the compensation issues presented in the instant case" (slip op. 5).[5] Those issues are squarely presented by this petition, and their importance is now concrete.

2. The court of appeals decided the compensation issue incorrectly. The court recognized, as the Commission had, that "characterizing the compensation payment as either a rate in itself or a change in the rates of the natural gas company * * * necessarily sets up a jurisdictional barrier to compensation" (App. A, *infra*, p. 10a). In an effort to breach that barrier, the court held that "compensation payments are not 'rates' but in the nature of surcharges" (*ibid.*). The court's substitute label, however, does not change the character and effect of compensation payments.

The payment of compensation by a high-priority user for the benefit of a low-priority user necessarily establishes the rate that the high-priority user must pay in order to receive the volumes of natural gas to

[5] The Court referred in an accompanying footnote to the court of appeals' decision in the present case, which was then pending on the Commission's petition for rehearing. Rehearing was denied by the court of appeals on January 20, 1976 (App. C, *infra*, pp. 18a-19a).

which he is entitled under the pipeline's curtailment plan. The court of appeals apparently recognized as much, describing the payment of compensation as "a condition for the receipt of higher priority gas" (*id.* at 12a). In operation, a compensation scheme would require the pipeline to increase the rates to its higher priority customers and to pass those increases on to the lower priority customers through decreased rates to them. That would unavoidably entail a fundamental restructuring of the pipeline's rates, and the Commission would be required to examine those rates to ensure that they are just and reasonable and not unduly discriminatory under Sections 4(a) and (b) of the Act.

Moreover, even if compensation payments could properly be viewed, not as "rates," but as "surcharges" imposed in a curtailment plan "to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans" (App. A, *infra*, p. 10a), that characterization would not raze the jurisdictional barriers perceived by the Commission. Section 4(a) of the Act provides that "[a]ll rates *and charges* made, demanded, or received by a natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable" (emphasis added). Thus, "surcharges" as well as "rates" must be just and reasonable under Section 4.[6]

[6] The Commission has historically required charges for jurisdictional transactions to be just and reasonable whether they are called "rates" or "surcharges." Cf. *Mississippi Power Co.*, 45 F.P.C. 269. An example of a surcharge is a purchased gas adjustment (PGA) clause. Under Section 154.38 of the Commission's regulations, a natural gas company may submit a purchased gas cost adjustment provision in its tariff to flow through changes in its cost of purchased gas. 18 C.F.R. 154.38(d)(4). Since a PGA charge changes the rate, it must be tested under the just and reasonable standard of Section 4 even though it may be characterized as a surcharge. Similarly, the Commission may sanction a gas company's demand charge credits, which effect a reimbursement to customers in a particular rate zone who have been curtailed more than the average in that zone. These credits, however, must be based on cost of service and are reviewed under Section 4 for their justness and reasonableness. Finally, while most curtailment plans contain a provision for penalty payments for unauthorized overtakes, the penalty provision must be filed as part of the curtailment tariff and is evaluated under the just and reasonable standard of Section 4. Thus, the court of appeals' reliance upon an analogy between compensation payments and overtake penalty payments (App. A, *infra*, pp. 10a-11a) actually supports rather than undercuts the Commission's position with respect to compensation payments.

Any compensation scheme, however, would necessarily result in rates that are "not just and reasonable" and therefore are "unlawful" under Section 4(a) of the Act. As the Commission said (App. D, *infra*, p. 22a):

> [I]t is elementary that a pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return. [Citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591.] If we required certain high priority jurisdictional customers to pay rates which included an increment to compen-

sate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

Similarly, rates resulting from compensation schemes would necessarily be unduly discriminatory, contrary to Section 4(b) of the Act. The point was made tellingly by Judge MacKinnon in his opinion dissenting from the District of Columbia Circuit's recent remand to the Commission in the *Transcontinental* case (see note 3, *supra*).[7] Under a compensation scheme, as Judge MacKinnon stated, the pipeline "would charge different rates to similarly situated customers which rates were not the result of differences in [the pipeline's] cost of serving these customers" (App. I, *infra*, p. 116a). Rather, the "different rates would result from the varying degree to which each customer is curtailed and the degree of curtailment would be determined in part by the character of the use of the gas by the customer" (*ibid.*). Judge MacKinnon correctly concluded that the resulting rate discrimination would be unreasonable because it "would penalize high priority users for the benefit of low priority users" (*id.* at 117a).

Moreover, under a curtailment plan with a compensation feature, those customers of a pipeline who forego volumes of gas to which they are contractually

[7] The majority of the court of appeals panel in *Transcontinental* did not reach the merits of the compensation scheme, believing that a remand for the development of a record on the pipeline's supply situation was a necessary precondition to a decision on the merits (see App. I, *infra*, pp. 114a-115a).

entitled and, in consideration therefor, receive compensation payments from customers who do receive gas, would be engaging in sales for resale of natural gas in interstate commerce without first obtaining requisite certificates of public convenience and necessity under Section 7(c) of the Act and without making the tariff filings required by Section 4(a) and (d). Although the court of appeals did not consider these transactions to be "sales in any realistic sense of the word" (App. A, *infra*, p. 11a), the Commission correctly determined that "[t]he elements of a sale are present" (App. H, *infra*, p. 85a) in the kind of "interstate brokering of contractual entitlements" (App. G, *infra*, p. 53a) that would take place under a compensation scheme.

Finally, even if the Commission could approve a compensation scheme as part of a pipeline curtailment plan, it would have no jurisdiction over the pipeline's rates or charges with respect to sales to direct industrial customers, such as the electric utilities involved in the present case. The Commission would therefore be powerless to ensure that the pipeline's charges to those customers reflected a reduction equivalent to the compensation payments made by higher priority customers.

3. A compensation scheme of the sort envisioned by the court of appeals would tend to defeat the objectives of end-use curtailment. The Commission has determined that the allocation of available natural gas supplies in times of shortage should be based on the use to which the gas will ultimately be put, so that,

when the demands of all customers cannot be met, those who would put the gas to inferior use would have their deliveries curtailed first. The Commission's statutory authority to follow an approach that focuses on end-use rather than contractual entitlements was upheld by this Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642-647. See also *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F.2d 925, 935-936 (C.A.D.C.), certiorari denied *sub nom. Southern California Gas Co.* v. *Federal Power Commission*, 419 U.S. 882; *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (C.A. 5).

By financially penalizing high-priority end-use customers for the benefit of low-priority users, a compensation scheme would, as Judge MacKinnon stated in his dissenting opinion in *Transcontinental*, "operate inconsistent with the approved objective of the Commission to base curtailment on end-use" (App. I, *infra*, p. 117a). Judge MacKinnon correctly identified the reasons for that inconsistency (*ibid.*; emphasis in original):

> [T]he higher price required to be paid by high priority users would deter such priority customers from fully satisfying their needs and would thereby make the unused portion of their full entitlements to gas available for low priority users which in many instances is the more inefficient use. In any event it has been determined to be the lower *priority* use and favoring such low priority use, to the extent that the compensation scheme does, would frustrate and interfere with the operational scheme of the curtailment plan by interjecting factors that work against the principles upon which the plan is based.

Under the court of appeals' decision in the present case, the Commission would nevertheless be required to impose such a scheme if necessary "to insure that the burdens of curtailment are spread evenly and equitably" (App. A, *infra*, p. 10a). Spreading the "burdens," however, means incorporating a financial disincentive for high-priority natural gas consumption, a disincentive that would undercut the end-use priority structure of the curtailment plan itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1635, 75-1712

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nov. 14, 1975

Petition for Review of an Order of the Federal Power Commission.

Before BELL, CLARK and RONEY, Circuit Judges.

BELL, Circuit Judge:

Mississippi Public Service Commission (MPSC) and Mississippi Power and Light (MP & L) seek review of an order of the Federal Power Commission denying MPSC's petition for extraordinary relief from a curtailment plan approved by the Commission for United Gas Pipeline Co. (United).[1] The

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[1] The currently effective curtailment plan for United was originally filed by United in 1971 and subsequently accepted, as modified, by the Commission in Opinion No. 606, 46 F.P.C. 786 (1971). The Commission subsequently rejected the cur-

extraordinary relief was to be in the form of payments from higher to lower priority customers of United to compensate the latter for the greater costs of alternative fuels they were forced to use as a consequence of curtailment. The Commission denied relief on the ground that it lacked jurisdiction to order or approve any plan of compensation. We disagree and therefore set aside the order and remand the case to the Commission for further proceedings.

I

This case arises from the interaction of the increasing shortage of natural gas with the inflationary effects of the general energy crisis. Natural gas, traditionally a cheap, clean and efficient energy source, has become even more attractive as a fuel bargain in the context of today's soaring energy costs. The regulated price of natural gas in the interstate market has become disproportionately low relative to

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tailment plan of Opinion No. 606 with its Opinion No. 647, 49 F.P.C. (1973) and Opinion No. 647-A, 49 F.P.C. 1211 (1973) which were reviewed by this court in *Louisiana* v. *FPC*, 5 Cir., 1974, 503 F.2d 844. This court found that the Commission had failed to comply with Section 5 of the Natural Gas Act in not finding the currently effective curtailment plan to be unjust and unreasonable and remanded the case to the Commission for further findings in that regard. The Commission's order on remand from this court, entered on September 6, 1974, is now pending before another panel of this court. *Louisiana Power & Light Co., et al.* v. *FPC*, Nos. 75-2183, 75-2339, 75-2347, 75-3057 (argued October 17, 1975).

the per energy-unit costs of alternative fuels. One consequence of the increasing inability of natural gas producers to meet the demands of their customers has been the need to curtail deliveries to those customers on the basis of some equitable plan, as approved by the Federal Power Commission. Where deliveries have been curtailed, natural gas users have been forced to use alternative, more expensive fuels.

The Supreme Court has held [2] that the Commission has the authority to approve curtailment plans of natural gas producers on the basis of the Commission's jurisdiction, under Section 1(b) of the Natural Gas Act, over the transportation of natural gas in interstate commerce.[3] The authority is subject to the statutory standard of Section 4(b) of the Act.[4]

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[2] *FPC* v. *Louisiana Power & Light Co.*, 1972, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369.

[3] Section 1(b), Natural Gas Act, 15 U.S.C.A. § 717(b) provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged, in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[4] Section 4(b), Natural Gas Act, 15 U.S.C.A. § 717c(b) provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the juris-

Numerous cases have arisen in the courts challenging various aspects of those plans, which allocate available natural gas on the basis of priorities determined primarily by the end use that particular customers make of the natural gas.[5] Under the usual plan, provision is made for seeking extraordinary relief where justified by exigent circumstances. The order here under review concerns such a petition.

II

MPSC filed its petition for extraordinary relief on August 5, 1974, on behalf of the consumers served by three Mississippi electrical utilities subject to its regulation, MP & L, Mississippi Power Company (MPC), and South Mississippi Electric Power Association (SMEPA).[6] These utilities, by virtue of their

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diction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[5] *See e.g., Consolidated Edison Co. of New York Inc.* v. *FPC,* D.C.Cir., 1975, 512 F.2d 1332; *Lousiana Power & Light* v. *FPC, supra; Atlanta Gas Light Co.* v. *FPC,* 5 Cir., 1973, 476 F.2d 142.

[6] Aside from the request for institution of a compensation plan, MPSC also requested that the electric utilities under its regulation be exempted from the curtailment of gas deliveries under the interim plan. The Commission denied this request also, but no party has chosen to appeal that denial. We therefore do not consider the issue.

"inferior" use of natural gas for boiler fuel,[7] had been given the lowest priority in United's curtailment plan, and had therefore been forced to use alternate fuels at four and five times the price of natural gas. The cost of these alternate fuels had been passed directly to their customers by the use of fuel adjustment clauses authorized by MPSC. All three utilities had firm contracts with United to supply varying amounts of natural gas, but the effect of the curtailment plan was to deny them their contractual entitlements in varying degrees.

The rationale of the relief sought by MPSC for the utilities was that the practical and economic burdens of curtailment should not fall solely on these lower priority users, but that, in order for the curtailment plan to be just, reasonable and equitable, the higher priority users should also bear some of the economic burden of curtailment. A number of parties intervened in the petition for relief, including the three Mississippi electric public utilities, Mississippi River Transmission Company (MRT) (a distributor of natural gas), and United, as the pipeline affected by any proposed plan of compensation. There were various other intervenors who are not now before the court. On October 17, 1974, the Commission granted the several interventions, but denied the relief requested by MPSC, stating:

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[7] The use of natural gas for boiler fuel is deemed "inferior" because it is the least efficient use of such fuel and because customers who make such use of natural gas can presumably convert to alternative fuels.

> Assuming MPSC's allegations of fact to be correct, we conclude that the petition should be summarily dismissed for lack of jurisdiction to grant the requested relief.

The Commission supported its decision by stating that a system of compensation payments would have several unlawful effects: first, jurisdictional resale rates under such a system, i.e., by United, would not be related to the pipeline's cost of service plus a reasonable rate of return, and would therefore be in violation of the statutory standard of just and reasonable. Second, the Commission has no jurisdiction over the rates of direct sale customers, who in most instances would give or receive such compensation payments. Finally, the Commission construed the petition as being "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment," a matter to be resolved only by an appropriate court.

MPSC, MP & L and MPC petitioned for rehearing, arguing that the Commission had misconstrued the request for relief. On December 4, 1974, the Commission granted the petition for purposes of further consideration, but finally denied the petition for rehearing and terminated the proceeding on February 13, 1975. The Commission noted that it had taken similar action in another but unrelated proceeding, and incorporated the reasoning in the orders in the other proceeding by reference.[8]

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[8] *Transcontinental Gas Pipe Line Co.*, FPC Docket No. RP72-99, Order Finding An Emergency On Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement, January 10, 1975, *pending review sub nom. Transcontinental Gas Pipe Line Corp., et al.* v. *F.P.C.*, D.C. Cir., Nos. 74-2036, et al. (argued May 21, 1974).

Although eschewing jurisdiction, the Commission goes further in that proceeding and seems to decide the petition for relief on the merits. We do not reach the merits, preferring to allow the Commission to reconsider the matter in light of our holding that jurisdiction exists. Moreover, any consideration on the merits in this court must be on the basis of findings made by the Commission on an adequate record.

III

MPSC and MP & L seek review of that final order in two appeals, No. 75-1635 and No. 75-1712, which are consolidated for review by this court. There are three intervenors: MPC sides with MPSC and MP & L in arguing that the Commission erred in finding no jurisdiction. MRT, as a high priority user who might have to make compensation payments, supports the Commission and asserts that, in effect, the lower priority customers are asking MRT to pay damages based on United's breach of contract. Finally, United supports jurisdiction in the Commission and the concept of compensation if submitted in and considered as a part of the present remanded curtailment proceeding or as a part of an industry-wide rule making proceeding.

MPSC and those who favor compensation argue that the Commission has jurisdiction, and the power under its jurisdiction to approve equitable curtailment plans, to impose a system of compensation pay-

ments to make such plans equitable as "pragmatic adjustments . . . called for by [the] particular circumstances." *FPC* v. *Louisiana Power & Light Co.*, 1972, 406 U.S. 621, 642, 92 S.Ct. 1827, 1839, 32 L.Ed.2d 369, 386, *quoting FPC* v. *Natural Gas Pipeline*, 1942, 315 U.S. 575, 586, 62 S.Ct. 736, 86 L.Ed. 1037, 1050. The Commission, on the other hand, asserts that it has no jurisdiction to order compensation payments and moreover, if it did, such payments would be either impractical or not in the public interest.

The question presented is one of law: Did the Commission have jurisdiction to effectuate relief of the type sought in the petition for extraordinary relief. *See Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, for a similar review of a denial of jurisdiction by the Commission. Our review of the Commission's decision is guided by the principle that, while we may not order the Commission to exercise its discretion in a particular way, we may order the Commission to consider a matter that is within the jurisdiction if such be the case. *Cf. Addison* v. *Holly Hill Fruit Products*, 1944, 322 U.S. 607, 622, 64 S.Ct. 1215, 88 L.Ed. 1488, 1499.

We consider whether the Commission was correct in light of the language of the Supreme Court in *FPC* v. *Louisiana Power & Light*, *supra;*

> Since curtailment programs fall within the FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective

means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, L.Ed. 1037, 1050 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ." 15 U.S.C. § 717*o*.

In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." (citations omitted)

406 U.S. at 642, 92 S.Ct. at 1839, 32 L.Ed.2d at 386.

It seems plain from this that the Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment.

The Commission argues to this court that it does not have the jurisdiction to order compensation, but approaches this position in reverse. The asserted lack of jurisdiction is not because there is no statutory basis for compensation, but rather because there are effects of compensation as well as provisos within the

Natural Gas Act that cumulatively preclude the implementation of compensation.

In its brief here, the Commission poses three ostensible barriers to compensation payments. They are somewhat like the reasoning given in its order denying relief. First, it asserts that compensation payments would result in discriminatory rates in violation of the stautory standard of Section 4(b) of the Natural Gas Act. 15 U.S.C.A. § 717c(b). Second, it asserts that compensation payments would in effect be sales for resale of gas in interstate commerce requiring both certification and filing of tariff schedules. Finally, the Commission urges that the Natural Gas Act specifically excepts from the Commission's jurisdiction ratemaking authority over direct sales of gas. 15 U.S.C.A. § 717(b).

The essential problem is that the Commission defines "rates" too broadly. By characterizing the compensation payment as either a rate in itself or a change in the rates of the natural gas company, the Commission necessarily sets up a jurisdictional barrier to compensation. It seems to us, however, that compensation payments are not "rates" but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission. Moreover, compensation payments are more analogous to the pen-

alty payments included by the Commission in various curtailment plans to deal with the problem of overtakes.[9]

The contention that compensation payments are sales for resale requiring certification and tariff filings is also without substance. Because we do not view compensation payments as rates but rather as being in the nature of surcharges or penalties, we do not find such payments to be sales in any realistic sense of the word.

Our characterization of compensation payments also answers the argument of the FPC that a system of compensation would require it to exercise ratemaking authority over direct sale customers. In addition, contrary to the Commission's view, the provision of the Act, Section 1(b), which denies the Commission jurisdiction over direct sales is not a limitation on the transportation jurisdiction of the Commission but rather should be seen in the context of the original regulatory scheme envisioned by Congress of complementary federal and state regulation. See e.g., *FPC* v. *Transatlantic Gas Pipe Line Corp.*, 1961, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742. The purpose of the proviso regarding direct sales was to

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[9] *See e.g.*, Panhandle Eastern Pipeline Company Tariff Schedules § 16.5, approved in 46 F.P.C. 1142, 1145 (1971); 47 F.P.C. 1567, 1569 (1972).

allocate the regulatory powers of the Commission and the various state agencies concerned with regulating the sale of natural gas within each state. The proviso does not preclude jurisdiction over the question of compensation as here presented.

In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.

Having considered the breadth of the Commission's jurisdiction, the question remains what action by this court is proper. In essence, what the Commission has done is to fail to exercise its jurisdiction by refusing to consider, with an appropriate record, a proposed remedy for an asserted wrong. *Cf. NLRB* v. *Food Store Employees*, 1974, 417 U.S. 1, 9-10, 94 S.Ct. 2074, 40 L.Ed.2d 612, 618. We, of course, intimate no view one way or the other as to whether compensation should be included. This court can, however, compel the Commission to exercise its jurisdiction by considering whether compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan. *Cf. Addison* v. *Holly Hill Fruit Products, supra.* Whatever the result on remand, the Commission should make findings supported by an adequate record, relating to the inclusion or the failure to include compensation as a part of a curtailment plan. *Cf. Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

The relief sought by petitioners would require a modification of the curtailment plan now filed with the Commission. Our decision is without prejudice to the Commission considering their petitions and related pleadings, whether by way of consolidation, intervention or otherwise, as a part of the proceedings on the curtailment plan.

Set aside and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 75-1635

Your No. FPC RP-74-37-12

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Power Commission (MISSISSIPPI CASE)

Before BELL, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Mississippi Public Service Commission for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this cause be, and the same is hereby, set aside; and that this cause be, and the same is hereby remanded to the Federal Power Commission for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs are to be taxed against any intervenors in support of the order of the Federal Power Commission.

November 14, 1975

Issued as Mandate: Jan. 28, 1976

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1975

No. 75-1712

Your No. FPC RP-74-37-12

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Power Commission (MISSISSIPPI CASE)

Before BELL, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Mississippi Power & Light Company for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this cause be, and the same is hereby, set aside; and that this cause be, and the same is hereby remanded to the Federal Power Commission for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs are to be taxed against any intervenors in support of the order of the Federal Power Commission.

November 14, 1975

Issued as Mandate: Jan. 28, 1976

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 75-1635 & 75-1712

[Filed U.S. Court of Appeals, Jan. 20, 1976,
Edward W. Wadsworth, Clerk]

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

(Opinion November 14, 1975, 5 Cir., 1975,
—— F.2d ——).

(JANUARY 20, 1976)

Before BELL, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.*

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* Chief Judge Brown, Judges Wisdom, Goldberg, Ainsworth, Godbold, Dyer and Gee, not participating.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

Docket No. RP74-37-12

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER DENYING PETITION FOR EXTRAORDINARY RELIEF, GRANTING INTERVENTIONS, AND TERMINATING PROCEEDINGS

(Issued October 18, 1974)

On August 5, 1974, the Mississippi Public Service Commission (MPSC) filed in the above referenced docket a petition for extraordinary relief from United Gas Pipe Line Company's (United) curtailment plan. Specifically, MPSC requests that the Commission immediately initiate a proceeding to establish a means by which certain electric utilities operating in the State of Mississippi [1] are compensated for the costs of replacement fuel they are required

[1] These electric utilities are Mississippi Power Company, Mississippi Power and Light Company, and South Mississippi Electric Power Association.

to use as a result of the curtailment of natural gas deliveries by United below their contractual entitlements. MPSC further requests that this Commission immediately issue an order permitting such electric utilities to receive their contract entitlements of natural gas from United until such time as a method of compensation is established in the proceeding requested, or until the price of oil approximates that of natural gas.

In support of its request, MPSC alleges that because of severe curtailment by United, the three electric utilities have been forced to use increasingly greater quantities of fuel oil to replace the natural gas they would otherwise be entitled to under their contracts. MPSC further alleges that it has permitted these electric utilities, subject to its jurisdiction, to include fuel cost adjustment clauses in their retail rate schedules and that, therefore, the cost of providing electric service in Mississippi has substantially increased to the ultimate detriment of electric consumers in that state since oil is more expensive than natural gas. In MPSC's view a portion of this increased financial burden, now being borne by those electric utilities and their customers, should be shifted to customers of United who have been accorded a higher priority for purposes of curtailment.

On August 16, 1974, we issued a notice of MPSC's petition, whereupon timely petitions or notices to intervene were filed by the following parties: Mississippi Power Company, Mississippi Power and Light Company, Attorney General of the State of Missis-

sippi, United Gas Pipe Line Company, Mississippi River Transmission Corporation, Laclede Gas Company, Texas Eastern Transmission Corporation, General Motors Corporation, Air Products, *et al.*, Mobile Gas Service Corporation, Shell Oil Company, Mississippi Valley Gas Company, New Orleans Public Service, Inc., and Entex, Inc. Untimely petitions were filed by Willmont Gas and Oil Company, City of Cleveland, Mississippi, and Gulf States Utilities Company.

Assuming MPSC's allegations of fact to be correct, we conclude that the petition should be summarily dismissed for lack of jurisdiction to grant the requested relief.[2] To begin with, it is elementary that a pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return.[3] If we required certain high priority jurisdictional customers to pay rates which included an increment to compensate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

Moreover, even if this Commission had authority to increase the rates for high priority jurisdictional

[2] A petition may be summarily dismissed without an evidentiary hearing where there is no dispute of facts and the only issue is one of law. See *Citizens for Allegan County, Inc.* v. *F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969).

[3] See *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1943).

service to a level which exceeds the pipeline's costs plus a reasonable rate of return, there is no means whereby we could insure that low priority direct industrial customers, such as the electrical utilities which are the subject of MPSC's petition, would be "compensated" for their costs of alternate fuel. We have no jurisdiction whatsoever over the rates which are charged by pipelines for their sales of gas to direct industrial customers; our rate jurisdiction is limited to sales in interstate commerce for resale.[4]

Finally, we believe that MPSC's petition is, in essence, nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment. Our position on United's damage liability, if any, was fully explained in Opinion No. 647-A[5] and need not be elaborated upon herein. It will suffice to state that a pipeline's damage liability, in the context of curtailments, is primarily a matter of contract law to be resolved by an appropriate court.[6]

[4] Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b); *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[5] Opinion No. 647-A, 49 F.P.C. 1200 (1973), issued on May 30, 1973, in *United Gas Pipe Line Co.*, Docket No. RP71-29, *et al.*, appeal pending *sub nom. State of Louisiana, et al.* v. *F.P.C.*, 5th Cir. Nos. 73-3478, *et al.*

[6] See *International Paper Co.* v. *F.P.C.*, 476 F.2d 121 (5th Cir. 1973).

The Commission finds:

(1) Good cause exists to deny MPSC's petition for extraordinary relief and to terminate this proceeding.

(2) Acceptance of the petitions to intervene that were filed late will not result in any delay in determining this proceeding.

(3) The intervention of the above-named petitioners in this proceeding may be in the public interest.

The Commission orders:

(A) The petition for extraordinary relief filed by MPSC on August 5, 1974, is hereby denied.

(B) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, however*, that the participation of such interventions shall be limited to matters affecting asserted rights and interests as specifically set forth in each petition to intervene; and, *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that all or any such intervenor might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(C) This proceeding is hereby terminated.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. RP74-37-12

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and Don S. Smith.

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER GRANTING REHEARING FOR FURTHER CONSIDERATION

(Issued December 4, 1974)

On November 4, 1974, the Mississippi Public Service Commission (MPSC) and on November 18, 1974, Mississippi Power Company (MPCo) and Mississippi Power and Light Company (MP&L) filed applications for rehearing of the Commission's Order issued October 18, 1974, in said docket. That order denied MPSC's petition for extraordinary relief from United Gas Pipe Line's (United) curtailment plan. Petitioners object to the aforementioned order on several grounds. The issues raised are complicated and require further study.

The Commission finds:

In order to afford additional time for consideration of the issues discussed in the applications for rehearing, it is appropriate and necessary in the administration of the Natural Gas Act to grant rehearing of our Order issued October 18, 1974, in the aforementioned docket.

The Commission orders:

Rehearing of the Order issued October 18, 1974, is hereby granted for the limited purpose of further consideration.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., William L. Springer, and Don S. Smith.

Docket No. RP74-37-12

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

ORDER DENYING APPLICATIONS FOR REHEARING

(Issued February 13, 1975)

On November 4, 1974, the Mississippi Public Service Commission (MPSC) and on November 18, 1974, Mississippi Power Company (MPCo) and Mississippi Power and Light Company (MP&L) filed applications for rehearing of the Commission's Order issued October 18, 1974, in said docket. That order denied MPSC's petition for extraordinary relief from United Gas Pipe Line's (United) curtailment plan. Specifically, MPSC requested that the FPC initiate a proceeding to establish a method whereby high priority users would compensate the other pipeline customers who have been curtailed. MPSC also requested the Commission to direct United to deliver to three Miss-

issippi electric utilities, Mississippi Power Company (MPCo), Mississippi Power & Light Company (MP&L), and South Mississippi Electric Power Association (SMEPA) their contract entitlements of natural gas pending completion of the aforementioned proceeding or until the price of oil approximated that of natural gas.

Petitioners object to the order dated October 18, 1974, which denied its petition and terminated the proceeding. MPSC asserts that the Commission misconstrued the nature of its petition and the extent of its own jurisdiction. Petitioners maintain further that the Commission order relates to the Fifth Amendment prohibition against the taking of private property without due process of law inasmuch as curtailment deprives the electric utilities of natural gas to which they are contractually entitled.

At the time of issuing the aforementioned order, we understood the thrust of the compensation proposal as being that high priority jurisdictional customers would compensate low priority customers who were curtailed to a greater extent. However, we concluded that we could not approve the proposed scheme. Furthermore, we were aware that the Commission had previously approved a similar compensation scheme in a tariff of the Transcontinental Gas Pipe Line Corporation [1] and addressed this issue in two recent orders.[2]

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[1] Docket No. RP72-99, Order Approving Interim Settlement Agreement, issued November 15, 1972.

[2] Order Finding an Emergency on Transco's System and Denying Motion for Interim Settlement as to Curtailment

In these orders, we clearly set forth the reasons on which we based our conclusion that such compensation schemes are unacceptable as a matter of law and policy. We stated therein that a compensation scheme would allow higher rates unrelated to the pipelines' cost of service plus a reasonable rate of return; foster discriminatory rates among groups of consumers contrary to Section 4 of the Natural Gas Act; and cause overall results which are inconsistent with equity and the public interest. Our determination as to the unlawfulness of the compensation scheme on the Transco System is subject to review by the Court of Appeals; however, the scheme will remain in effect pending the court's determination of the legality of the procedure.

We will not consider the initiation or implementation of such a compensation scheme which we have found to be unlawful. Furthermore, our refusal to consider a compensation scheme in an appropriate rate schedule filing does not in our opinion, raise Fifth Amendment questions. Moreover, the implementation of a natural gas allocation program (curtailment plan) under such rate schedules is not proscribed by Fifth Amendment guarantees. The petitions for rehearing do not raise any new arguments which were not previously briefed fully, considered, and rejected by the Commission in our Order dated

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Rules, Docket No. RP72-99, issued November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement, Docket Nos. RP72-99 *et al.*, issued January 10, 1975.

October 18, 1974. The petitions for rehearing must be denied.

The Commission finds:

The assignment of errors and grounds for rehearing set forth in the petitions filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission Order dated October 18, 1974.

The Commission orders:

The petitions for rehearing of Order dated October 18, 1974, filed by the above-named petitioners are denied.

By the Commission. Commissioner Brooke, dissenting, filed a separate statement appended hereto.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPE LINE COMPANY

Mississippi Public Service Commission

Docket No. RP74-37-12

(Issued February 13, 1975)

BROOKE, Commissioner, *dissenting*:

On October 18, 1974, the Commission denied the petition of the Mississippi Public Service Commission (MPSC) for extraordinary relief from the curtailment plan of United Gas Pipe Line Company (United) by initiating a proceeding to develop a procedure whereby those high priority customers of United would financially compensate lower priority customers for gas unevenly allocated in circumstances of equal contract entitlement.

MPSC's petition resulted from heavy curtailment of three Mississippi electric utility companies—Mississippi Power Company, Mississippi Power & Light Company and South Mississippi Electric Power Association, all of which have firm contracts with United under Federal Power Commission certificates. MPSC states that, although all firm customers are entitled to contractual volumes, discrimination results because the mechanics of United's plan allocates a greater portion of gas to some firm customers at the expense of other firm customers with equal entitlement.

MPSC is correct in its allegation that end-use curtailment allocates the available supply unevenly, ra-

ther than ratably, among firm customers. However, the U. S. Court of Appeals for the District of Columbia has affirmed the Commission's statement of policy in Order No. 467 which bases curtailments on end-use—and not contract entitlement.[1] This does not mean, in my opinion, that the Commission should ignore the possibility of a compensation procedure, based on some ratable allocation device, as another device in apportioning gas supplies. Certainly, the Commission has been most realistic and objective in considering petitions for specific volumetric relief to avoid irreparable harm, as provided for in Order No. 467 *et seq.*

In a series of recent orders[2] to which I have dissented, the Commission has determined as a matter of law and policy that compensation procedures of pipeline curtailment programs are *per se* illegal. I do not agree that such compensation plans are unlawful, and feel that prohibiting them is poor Commission policy. Pipelines and their customers have found such plans conducive to better supply manage-

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[1] *Pacific Gas and Electric Company, et al.* v. *Federal Power Commission,* No. 73-1358, *et al.,* U.S. Ct. of Appeals, D.C., opinion and order issued June 26, 1974.

[2] *Transcontinental Gas Pipe Line Corporation,* Docket No. RP72-99, order issued November 12, 1974; rehearing denied in part, January 10, 1975; *Consolidated Natural Gas Company,* Docket No. RP73-115, order issued January —, 1975; *Northwest Pipeline Corporation,* Docket No. RP74-49, order issued January —, 1975; *Columbia Gulf Transmission Corporation, et al.,* Docket No. RP73-851, *et al.,* order issued January —, 1975.

ment and flexibility in curtailment as envisioned by Order No. 467 *et seq.*

In *Pacific Gas and Electric Company,* the appellate court quoted and commented (Pages 14-16) as follows on certain parts of Order No. 467 which bear on MPSC's plea for hearing:

> "Order No. 467 does not establish a curtailment plan for any particular pipeline. The effect of the order is to inform the public of the types of plans which will receive initial and tentative FPC approval, but there is no assurance that any such plan will be finally approved. As the Commission stated:
>
> > When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.
>
> 49 F.P.C. at 85.
>
> [Order No. 467 is] not finally determinative of the rights and duties of a given pipeline, its customers or ultimate consumers; it expressly envisions further proceedings.
>
> 49 F.P.C. at 585.
>
> Many applicants seek clarification of Order No. 467 by Commission definition of all terms used, or modification of the substance of Order No. 467 by a reordering of priorities. These applicants err in treating Order Nos. 467 and 467-A as a rule of substance,

which precisely defines the curtailment rights and obligations of all pipelines and all pipeline customers. We ascribe no such effect to Order Nos. 467 and 467-A, for, as already stated, these Orders are intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases.

49 F.P.C. at 586. Not only will petitioners have an opportunity to challenge the merits of the proposed plan, they will also have an opportunity to demonstrate that the plan is inappropriate in particular circumstances.

As discussed below, Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a bindingrule without further proceedings directed towards curtailment problems on specific pipelines.

49 F.P.C. at 583.

The stated priorities are intended to be a safe starting point from which deviations may be made based on an evidentiary record.

Order Denying Motions for Reconsideration, Clarification or Modification of Order 467-B (April 25, 1973); Jt. App. at 80.

We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order No. 467 that the policy therein stated could, and would, be adjusted inappropriate cases where the hearing record so required.

49 F.P.C. at 584.

We, of course, recognize that extraordinary circumstances may preclude the strict adherence to the priorities established and, consequently, we will permit those persons who allege that their cirucumstances require such extraordinary treatment to file petitions for relief under Section 1.7(b) of our Rules of Practice and Procedure. Barring such circumstances, our review of those curtailment proceedings and our knowledge of the industry convinces us that the priorities-of-delivery set forth below should be applied to all jurisdictional pipeline companies during periods of curtailment.

49 F.P.C. at 85-86.

This does not mean that the parties may not propose or the commission may not adopt variations on the Sec. 2.78(a) plan, but there must be evidence in the record to support any such variations. Nor does it mean that adversely affected pipeline customers may not claim a right to special relief from the operation of a Sec. 2.78(a) plan, but in such instances there must be evidence to support any such claim. In this way, Sec. 2.78(a) will assist the parties and the Administrative Law Judge in arriving at a curtailment plan which will

meet the problems created by diverse needs for gas in the face of a nation-wide gas shortage and at the same time be adapted to the peculiarities, if any, of the particular pipeline system involved."

It is apparent that the broad language of Order No. 467 counsels the desirability of curtailments tailored to individual pipelines and their load and operating characteristics.

The Commission's current holding that any compensation procedure is unlawful as a matter of law and undesirable as a matter of policy was made absent any evidentiary consideration based on a litigated proceeding or any conclusions based on comments to a rule-making. The transfer of gas, with appropriate compensation, from one pipeline customer to another to ameliorate curtailment is as legitimate a response to an emergency as the 60-day procedures set forth in 2.68, 157.29 and 157.22.

Honoring MPSC's request for a hearing would initiate the necessary evidentiary proceeding precedent to an objective decision. An alternate approach would be through a rule-making or responses to a statement of policy. Only through appropriate hearing or rule-making can MPSC's case be fairly and equitably judged in light of current gas supply and economic condition.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Docket No. RP72-99

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER FINDING AN EMERGENCY ON TRANSCO'S SYSTEM AND DENYING MOTION FOR INTERIM SETTLEMENT AS TO CURTAILMENT RULES

(Issued November 12, 1974)

On September 30, 1974, Transcontinental Gas Pipe Line Corporation (Transco) filed a motion requesting Commission approval of an interim settlement agreement setting forth a curtailment plan to be implemented on the Transco system for a one year period beginning on November 16, 1974, and terminating on November 15, 1975. Notice of this motion was issued on October 4, 1974, 39 *Fed. Reg.* 36923 (October 15, 1974), whereupon comments were filed by several of Transco's customers.

On the basis of the motion, the testimony attached thereto, and the comments filed thereon, we are compelled to deny Transco's motion. In our judgment, the

proposed interim curtailment plan is unjust, unreasonable, discriminatory, and contrary to the public interest. The reasons for our decision will follow. Preliminarily, however, it may be helpful to review the extensive and complex background of this case.

I. *Procedural Background*

On May 17, 1971, in response to Commission Order No. 431, Transco filed a proposed permanent curtailment plan. By order dated May 27, 1971, we suspended the implementation of that plan for one day, and provided for a hearing to determine its lawfulness.

Subsequently, the parties to this proceeding negotiated their first interim settlement agreement which proposed an emergency gas curtailment plan to be followed from November 16, 1971, through November 15, 1972. One of the provisions of this agreement was as follows:

> Transco agrees that, on or before December 15, 1971, it will advise its customers, interested State Commissions, and the staff of this Commission of its long-term curtailment plans, and will submit revised tariff sheets setting forth such long-term curtailment rules. Additionally, Transco agrees that such new tariff sheets will be filed with this Commission no later than January 17, 1972, but will not be made effective prior to November 16, 1972.[1]

[1] See p. 3 of Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971.

The proceedings involving Transco's May 17, 1971 filing were to terminate upon the filing of a permanent plan in accordance with the agreement.

Accepting the representations of the parties at face value, we issued an order on November 15, 1971, conditionally approving the settlement "without prejudice to any findings or order of the Commission in any future proceeding involving Transco's * * * tariff provisions." [2]

On January 17, 1972, Transco filed a proposed permanent plan which was suspended and made the subject of hearings. Thereafter, however, the parties entered into a second interim curtailment plan to be followed from November 15, 1972, until November 15, 1973. Given the circumstances then prevailing on Transco's system, and in view of a commitment by Transco to file a permanent plan on or before May 1, 1973, we issued an order on November 15, 1972, approving the interim plan as just, reasonable, and in the public interest.[3]

Commitments notwithstanding, Transco did *not* file a permanent plan with the Commission on May 1, 1973; it filed, instead, a motion requesting that the interim plan be extended for yet *another* year. On May 23, 1973, we rejected this motion as failing to comply with Transco's agreement, and directed that an appropriate curtailment plan be filed on or before

[2] Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971, p. 4.

[3] Order Approving Interim Settlement Agreement, issued November 15, 1972, p. 8.

July 1, 1973.[4] In that order, we advised Transco that it should "give consideration to Order 467-B," and, further, that any plan not in conformity with Order 467-B "may be found to be discriminatory or preferential, and Transco undoubtedly recognizes the risks * * *."[5]

On June 29, 1973, Transco submitted a proposed permanent plan which, with few exceptions, embodied the end use priorities of Order No. 467-B. Soon thereafter, however, on July 6, 1973, Transco submitted a renewal of its motion for a one-year extension of the interim plan.

On July 30, 1973, we issued an order which suspended Transco's proposed permanent plan and permitted its effectuation on November 16, 1973, pending the completion of hearings as to its lawfulness.[6] We also denied reconsideration of Transco's request for a one year extension of the interim plan. As a result, several petitioners filed applications for rehearing alleging that Transco's proposed permanent

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[4] Order Denying Motion for One-Year Extension of Interim Curtailment Plan and Providing for Filing of Curtailment Plan, issued on May 23, 1973.

[5] *Id.* at p. 2.

Note: Order No. 467-B was affirmed in full in *Pacific Gas and Electric Company* v. *F.P.C.*, —— U.S.App.D.C. ——, —— F.2d —— (D.C. Cir. No. 73-1358, decided June 26, 1974).

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[6] Order Denying Motion for Reconsideration, Permitting Intervention, Fixing Date of Hearing, Specifying Procedures, and Suspending Proposed Revised Tariff Sheets, issued July 30, 1973.

plan was not voluntarily filed, but rather was the consequence of coercion by this agency. In our order of September 17, 1973, we emphatically denied these charges, and made it clear that—

> * * * our order in this proceeding neither ordered, directed, nor prescribed either directly or indirectly, any specific filing on the part of Transco.[7]

With reference to Order No. 467-B, we further stated that all pipelines remain free to file curtailment plans in whatever form they choose.[8]

II. *Stay Orders Issued By The United States Court Of Appeals For The District Of Columbia Circuit*

On September 18, 1973, Consolidated Edison Company of New York, a large Transco customer which uses much of its gas for low priority boiler fuel, filed a petition to review our orders, as well as a motion to stay those orders and continue the interim plan. Pursuant to this motion, and others subsequently filed, the D.C. Circuit, on November 9, 1973, issued an order staying the Commission's orders until further order of the court. Since the effect of the Court's stay was unclear, the Commission thereafter filed a petition for rehearing and clarification. As a result, on December 14, 1973, the Court issued an order stating, *inter alia*:

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[7] Order Denying Rehearing, issued September 17, 1973.

[8] *Id.* at p. 3.

By our order of November 9, 1973, we stayed the effect of the respondent's order dated May 23, 1973, and respondent's order of July 30, 1973. We did not intend, however, to prevent respondent from holding hearings to consider a permanent plan for Transco.

In our order of November 9, 1973, we stated that we wished to preserve the status quo. By this, we meant that we wished to continue in effect the situation as it existed on May 23, 1973, date of the first order which petitioners have requested us to review. Accordingly, Transco's then existing interim curtailment plan is to continue in effect *until further order of this Court*. Insofar as the respondent Commission's powers are concerned, they are no different than during the existence of the interim plan that we continued in effect by our order of November 9, 1973. (Emphasis added).

In the latter part of this summer, two of Transco's customers, Philadelphia Electric Company and Philadelphia Gas Works, filed motions with the Commission requesting that Transco be ordered to file a new interim plan, based upon the end use priorities of Order No. 467-B, to be followed for one year commencing with November 16, 1974. In these motions it was alleged that the currently effective pro rata plan would not be sufficient during the impending winter to protect high priority customers. Specifically, Philadelphia Electric alleged (Motion, p. 2):

> * * * [T]he interim pro-rata curtailment plan under which Transco is presently operating will no longer provide the protection to firm markets that it has in the past due to substantially increased curtailment levels. In all likelihood this plan will not afford protection to the high priority of service categories 1 and 2 [*i.e.*, (1) residential, small commercial, and (2) large commercial, firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements].[9]

Moreover, Philadelphia Electric complained (Motion, p. 3):

> * * * [T]he prospect of extensive curtailments of P.E. Co.'s firm industrial markets with attendant loss of jobs and productivity forbodes such serious consequences that P.E. Co. and its customers must be afforded a timely opportunity to take all prudent steps necessary to alleviate the impact of cuurtailments. Since other forms of energy are in short supply, including propane and low sulphur oil, an atmosphere of uncertainty regarding implementation of pipeline curtailment procedures is intolerable.
>
> P.E. Co. submits that the Commission has before it substantial evidence in the instant record upon which to issue an order that emergency steps are necessary to afford high priority categories, 1 and 2, protection from curtailment this coming winter. Furthermore, this evidence compels the issuance of an order requiring Transco to implement a 467-B end use curtailment plan

[9] Bracketed material supplied on the basis of Order No. 467-B.

for the forthcoming winter on an emergency interim basis.

Notwithstanding these allegations, and notwithstanding any justification they might have on the basis of the record, we recognized our inability to provide any meaningful response as long as the Court's stay was effective. Rather than ignore these claims of impending harm, however, we filed a motion with the D.C. Circuit requesting that the Court permit the Commission to examine these complaints, examine the record, and "take any action which, on the basis of the evidence presently available, is necessary to assure just, reasonable, and nondiscriminatory curtailment on an interim basis for the forthcoming winter * * *." [10]

On October 4, 1974, the Court of Appeals granted the Commission's motion for clarification, but it explicitly refused to permit any action which, in the Commission's judgment, is required to protect the public interest. Specifically, the Court ordered:

> * * * Transco's interim curtailment plan which is in effect on May 23, 1973 and which has continued in effect since that time will remain in effect until the administrative proceedings regarding Transco's permanent plan have been completed and the Commission implements that plan.
>
> Our orders of November 9 and December 14 do not, however, prevent Transco from submit-

[10] Motion of Federal Power Commission for Clarification, p. 14.

> ting a new interim plan to the Commission under § 4 of the Natural Gas Act, nor do they affect the Commission's powers to implement such a plan or to suspend it pending hearings.
>
> Therefore, the curtailment plan in effect for the coming Winter will be *either* the interim plan currently in effect *or* such new interim plan as Transco may submit and the Commission may approve. The Commission's power to respond to petitions for emergency relief from the curtailment plan in effect are no different than they have always been under the curtailment plan which this order continues in effect. [Emphasis added]

Thus, the Commission has been given two choices: (1) continue the past interim plan which is based upon a pro-rata reduction in contractual entitlements, or (2) approve *in toto* the proposed interim settlement plan which is based, in part, upon a pro rata reduction of contractual entitlements. If we find that neither plan is just and reasonable, that both will be discriminatory, or that both will cause irreparable harm, we are not free to take remedial action.

III. *Current Emergency*

For those who have witnessed the steady decline in Transco's ability to meet system requirements, it can scarcely be denied that Transco's customers are faced with an emergency which threatens irreparable harm. In its most recent Form 16,[11] filed with the Com-

[11] Form 16 reports are filed with the Commission twice each year, pursuant to Order No. 489, 50 F.P.C. 561 (1973).

mission on September 30, 1974, Transco projects that from September of 1974 through August of 1975, its firm requirements of 1,107,000,000 Mcf will be curtailed by 307,364,000 Mcf, or approximately 28%. For the winter period, extending from November of 1974 through March of 1975, Transco projects that its firm requirements of 509,834,000 Mcf will be curtailed by 100,784,000 Mcf, or approximately 20%.

The magnitude of the crisis on Transco's system is brought into even greater focus when one considers the petitions for extraordinary relief which have been filed. See, *e.g.* Petition of Stauffer Chemical Company for Interim and Permanent Extraordinary Relief from Curtailment Plan, filed on September 6, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Eastern Shore Natural Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 10, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Farmers Chemical Association, Inc. for Temporary Extraordinary Relief, filed on October 16, 1974, in Docket No. RP75-16-2; Petition of South Jersey Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 17, 1974, in Docket No. RP75-16-3; Petition of New Jersey Zinc Company for Extraordinary Relief from Curtailment, filed on November 5, 1974, in Docket No. RP75-16-4.

Thus, the need for prompt action by this Commission is manifest. As the Fifth Circuit has stated:

> * * * the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective *interim* curtailment action in the exigencies presented by gas shortages.[12] [Emphasis added]

Interim curtailment regulation has been traditionally accomplished through the procedural devices of either Sections 4 or 5 of the Natural Gas Act. Under Section 4, the Commission may accept and suspend a company-filed plan, permitting its effectuation pending the completion of hearings. Under Section 5, the Commission may prescribe an interim plan for the company if, after hearings, it determines the existing plan to be unjust and unreasonable. The validity of both procedures has been sustained in full by the Supreme Court. *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621, 643-647 (1973).

In the present case, however, our authority, as defined by the Supreme Court in *LP&L*, has been severely circumscribed by the D.C. Circuit. We have no power to permit the effectuation of Transco's permanent plan which was filed under Section 4 on June 29, 1973, and suspended by the Commission on July 30, 1973. Moreover, in view of the Court's stay, we have no power to prescribe an interim plan under Section 5, though the Supreme Court has said that "even when concluding a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan. *F.P.C.* v. *Natural*

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[12] *Atlanta Gas Light Co.* v. *F.P.C.*, 476 F.2d 142, 150 (5th Cir. 1973); See, also, *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972).

Gas Pipeline Co., 315 U.S. 575 (1942)." [13] Notwithstanding these limitations on our ability to act, however, we proceed with the findings which are required by the record.

IV. *The Proposed Interim Plan*

A. *Analysis*

The proposed interim settlement is, of course, a result of compromise by the customers participating in this proceeding. Those customers whose use of gas is relatively inferior, in terms of the public interest, obviously desire pro rata curtailment on the basis of contractual entitlements. In contrast, high priority customers would be more satisfied with the end use priorities of Order No. 467-B. To resolve the conflict, they have agreed to split the loaf. Specifically, the proposed interim plan assigns a seasonal or annual entitlement to each customer. These entitlements were determined on the basis of 50% pro rata curtailment and 50% curtailment under an Order No. 467-B and use plan, with certain adjustments for residential, commercial, and essential industrial requirements.[14]

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[13] *F.P.C.* v. *Louisiana Power & Light Company, supra* at 644, n. 18.

[14] For example, consider a customer whose contract demand is 20,000 Mcf per day. On a day of 20% curtailment, that customer would be entitled to 16,000 Mcf under a pro-rata plan. During the same degree of curtailment under the Order 467-B end use plan, however, the customer may be entitled to less, which, for purposes of hypothesis, we shall assume to be 10,000 Mcf. Under the proposed interim plan, the customers' entitlement would be 13,000 Mcf which is the result of addi 50% of the pro rata entitlement (8000 Mcf) and 50% of t e end use entitlement (5000 Mcf).

The heart of the proposed plan, however, is not in the curtailment procedure outlined in Article II of the settlement, but rather in the "Compensation for Curtailment" provisions of Article III. Under these provisions, those customers who suffer the most curtailment will receive compensation, while those curtailed least will provide that compensation. More specifically, Article III provides:

> * * * CD, ACQ and firm direct industrial customers being curtailed greater than the average curtailment of such customers shall receive credits to their bills from Transco of 50 cents per Mcf of such greater curtailment and the bills of customers in the same categories being curtailed less than the average curtailment of such customers shall be debited with an amount of 50 cents per Mcf of such lesser curtailment. In addition, it is agreed that at the end of the winter season, 25 cents shall be credited to the bills of customers for each Mcf which such customer had been curtailed greater than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use and 25 cents shall be debited to the bills of customers for each Mcf which such customers had been curtailed less than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use.

Insofar as the other material provisions of the proposed settlement are concerned, Article IV provides that the agreement shall terminate on November 16, 1975; Article V provides that extraordinary relief will not be sought by Transco's customers through the period ending November 15, 1975, except for certain unforseen circumstances; Article VI provides for dismissal of pending court cases,[15] upon Commission approval of the settlement; Article VII provides that the interim settlement will not be challenged on environmental grounds; and Article VIII requires Transco to furnish its customers periodic curtailment reports.

B. *Findings*

If agreement among the majority of participating customers was the proper measure of the public interest, we would be constrained to approve the settlement now before us. However, our responsibilities under the Natural Gas Act require something more than the counting of votes. Indeed, as the Court of Appeals for the District of Columbia Circuit properly stated in *Michigan Consolidated Gas Company* v. *F.P.C.*, 108 U.S.App.D.C. 409, 283 F.2d 204 (1960), certiorari denied, 364 U.S. 913 (1960):

> In viewing the public interest, the Commission's vision is not to be limited to horizons of

[15] *Consolidated Edison Company of New York, Inc., et al.* v. *F.P.C.*, D.C. Cir. Nos. 73-1999 and 73-2017.

> the private parties to the proceeding (283 F.2d at 226).[16]

Viewed in this perspective, we cannot place our imprimatur upon the settlement. To the contrary, we are compelled to find that the proposed interim plan is unjust, unreasonable, discriminatory, and contrary to every element of the public interest.

We believe that the proposed scheme of compensation, which is the cornerstone of the settlement, is patently unlawful and beyond our jurisdiction to either approve or enforce. In essence, it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return. We have recently rejectd a similar scheme in *United Gas Pipe Line Company*, Docket No. RP74-37-12 (order issued October 18, 1974), and what we said there applies equally well to this case (*mimeo* at 2-3):

> * * * [A] pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return. If we required certain high priority jurisdictional customers to pay rates which included an increment to com-

[16] See, also, *Scenic Hudson Preservation Conference* v. *F.P.C.*, 354 F.2d 608, 621 (2nd Cir. 1965), certiorari denied, *sub. nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). Cf. *Pennsylvania Gas & Water Company* v. *F.P.C.*, —— U.S.App. D.C. ——, 463 F.2d 1242 (1972); *Greater Boston Television Corp.* v. *F.C.C.*, —— U.S.App.D.C., 444 F.2d 841 (1970).

> pensate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

In addition to being unlawful because of its departure from the concept of cost-based pipeline rates, the proposed compensation scheme would foster undue discrimination in rates among similarly situated customers, contrary to Section 4(b) of the Act, 15 U.S.C. § 717c(b). For example, consider a situation in which two customers in the same zone, Company A and Company B, have identical needs of 10,000 Mcf on a given day. Because of differences in contract, however, Company A's entitlement under the curtailment program is only 8,000 Mcf per day, whereas Company B's entitlement is 12,000 Mcf. Under the proposed compensation scheme, Transco would be permitted to deliver 10,000 Mcf to each customer on that given day, but Company A's rates could be *increased* by $1,500 that day (2000 Mcf x .75 per Mcf in excess of entitlement), whereas Company B's rates could be *decreased* by $1,500 that day (2000 Mcf x .75 per Mcf below entitlement).

Putting the discrimination issue aside, the proposed compensation plan also contemplates circumvention of the rate change requirements of Section 4(d) of the Act, 15 U.S.C. § 717c(d):

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the parties.

With each brokering of a contract entitlement under the proposed plan, there would be a change in jurisdictional rates, *i.e.* one customer's rates would be increased, while another's would be decreased. To permit this without compliance with Section 4(b), would require a Congressional amendment. *Episcopal Theological Seminary* v. *F.P.C.*, 269 F.2d 228 (D.C. Cir. 1959), certiorari denied, *sub nom. Pan American Petroleum Corp.* v. *F.P.C.*, 361 U.S. 895 (1959).

Finally, we believe that implementation of the proposed compensation plan, if approved, would have serious, and obviously unforseen, jurisdictional repercussions upon Transco's customers. In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce.[17] Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. § 717f(c). If such a certificate were sought, we would be required to examine all issues bearing upon the public interest, including the proposed rate of the sale.

We must acknowledge that in our previous orders allowing the currently effective interim plan to operate through November 15, 1973, we approved a sim-

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[17] Cf. *United Gas Improvement Co.* v. *Continental Oil Co., et al.*, 381 U.S. 392 (1965).

ilar compensation scheme which provided that customers who are exempted from curtailment on a given day would be debited with a 25¢ surcharge per Mcf, whereas customers which are curtailed more than the announced level would be credited with 25¢ per Mcf. Viewed in the light of the circumstances existing at that time, we regarded the compensation feature as nothing more than a billing arrangement. Closer scrutiny, however, convinces us that it was something more; indeed, it was the harbinger of a full-scale program which would permit the interstate brokering of contractual entitlements without Commission approval. Whatever our judgments of the past may have been, we cannot now approve a scheme which promises (1) higher rates which are based upon the market value of contract entitlements, rather than the pipeline's cost of service plus a reasonable rate of return, (2) discriminatory rates among customers of the same class, (3) violation of the notice provisions of Section 4(e) of the Act, and (4) interstate sales for resale of natural gas without rate and certificate approval by this Commission.

Having thus concluded that the proposed interim settlement is unlawful, discriminatory, and contrary to the public interest, we are faced with the fact that the currently effective pro-rata curtailment plan will continue in effect during the impending winter, unless the courts intercede. This is unfortunate, indeed, as we will demonstrate.

V. *The Currently Effective Interim Plan*

A. *Analysis*

The currently effective interim plan, which has been continued by the D.C. Circuit beyond any period anticipated by Transco, is based upon contractual considerations, rather than end use. It provides, first, for the curtailment of all of Transco's interruptible sales, and, second, for the curtailment of firm direct and major resale customers on a pro rata basis, but only to the extent that interruptible services of the resale customers are curtailed. Through an exemption procedure in winter, individual customers are entitled to have curtailment eliminated or reduced in order to protect firm customers. Finally, if firm service of customers cannot be met, priorities are established to permit further curtailment for the protection of human needs customers.

As noted above, the currently effective plan also has a compensation provision whereby customers who are exempted from curtailment on a given day are debited with a surcharge of 25¢ per Mcf, whereas customers which are curtailed more than the announced level of curtailment are credited with 25¢ per Mcf.

B. *Findings*

In our orders of May 23, 1973, July 30, 1973, and September 17, 1973, we essentially found that any further prolongation of the currently effective interim

plan would not be in the public interest. We remain of that view.

To begin with, we believe that the legal impediments inherent in the compensation plan of the proposed settlement are also inherent in the compensation feature of the currently effective plan. Our rationale has been set forth above and need not be reiterated.

Secondly, we do not believe that it is in the public interest to continue interim curtailment on a pro rata basis for the *fourth consecutive year*. On more than one occasion,[18] we have indicated that curtailment should be based upon end use considerations, in the absence of compelling evidence demonstrating that some other plan is just, reasonable, and nondiscriminatory. Moreover, the importance of end use in the promulgation of curtailment plans, has been consistently recognized by the courts. The Supreme Court has taken note of the need to protect "schools, hospitals, and homes completely dependent on a continued natural gas supply for heating and other domestic uses," [19] and the D.C. Circuit has recently agreed that "end use is a most appropriate consideration for purposes of a curtailment plan." [20]

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[18] See, *e.g.*, *United Gas Pipe Line Company*, Docket Nos. RP71-29, *et al.*, Opinion No. 647, 49 F.P.C. 179 (1973); *Arkansas Louisiana Power and Light Company*, Docket No. RP71-127, Opinion No. 643, 49 F.P.C. 53 (1973).

[19] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1973).

[20] *American Smelting and Refining Company* v. *F.P.C.*, —— U.S.App.D.C. ——, 494 F.2d 925 (D.C. Cir. 1974), certiorari denied *sub nom. Southern California Gas Co., et al.* v. *F.P.C.*, —— U.S. —— (October 14, 1974).

We do not say, of course, that an end use plan is the only type of plan which we will consider for Transco on a permanent basis; our decision on a permanent plan will be the one that is required after a full examination of the extensive record in this case. We do believe, however, that given the evils inherent in a pro rata plan which is based upon private contracts rather than public interest, curtailment on the basis of end use priorities affords the best interim protection for the consumers.

With the increased level of curtailment which is projected for the coming winter, it is clear that the currently effective interim plan will place firm service, including service to high priority customers, in jeopardy. This fact is not only borne out by the many petitions for relief currently pending before us, but it is candidly acknowledged by the sworn and unchallenged testimony of Transco's own witness, Mr. C. H. Mullendore, Jr., Vice President of Marketing:

> * * * I am not able to give assurance that, at the projected deeper levels of curtailment on Transco's system, the present interim plan would operate beyond November 15, 1974 in a manner to accomplish its basic objective of protecting all firm loads. This is so because the plan depends upon actual market conditions and there is no built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed

to protect the firm loads of the rest of the system.

For the reasons heretofore stated, we cannot lawfully approve the proposed interim settlement. There is, however, a plan which will alleviate Transco's concern, and that is the proposed plan which was filed by Transco on June 29, 1973, suspended by our order of July 30, 1973, and stayed subsequently by the D.C. Circuit. Unlike the currently effective interim plan, that plan *does* have a "built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed to protect the firm loads of the rest of the system." Specifically, the plan which was suspended by our order of July 30, 1973, requires that all large interruptible service, whether direct or indirect, be curtailed prior to any curtailment of firm service. Moreover, this plan embraces a system of end use priorities which are based upon public interest considerations rather than the vicissitudes of contract. Residential and small commercial customers are given the highest protection, regardless of the distributor's agreement with Transco. Furthermore, essential industrial uses, such as those for feedstock, plant protection, process needs, and pipeline customer storage injection, are afforded higher protection than other industrial uses.[21]

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[21] We recognize that the plan suspended by our order of July 30, 1973, also contains a compensation scheme providing that customers which receive more than the system average shall pay 25¢ per Mcf for such over supply, while those receiving less shall obtain a credit of 25¢ per Mcf for such under supply. These provisions present no immediate problem, however, because they cannot be implemented without prior certificate and rate approval by this Commission. See discussion at pages 13-14.

Unfortunately, however, this plan cannot be implemented for the present winter because our suspension order permitting its effectuation as of November 16, 1973, has been stayed by the Court of Appeals. With the hope that this impediment can be alleviated, and that threatened irreparable harm for the impending winter can be avoided, we are directing our Solicitor to immediately seek a dissolution of the stay. We cannot overemphasize the importance of an expeditious decision on this matter. In our judgment, the interim plan to be followed for this winter—whatever its nature—must be placed into effect on or before November 30, 1974. Transco and its customers must be given sufficient time to prepare for the harsh months ahead. Moreover, a switch of curtailment plans during mid-winter will create operational chaos and exacerbate, rather than alleviate, irreparable harm.

In closing, we must confess to a sense of frustration which arises out of our duty to regulate Transco's curtailments, on the one hand, and our inability to regulate, on the other, as a result of the Court's stay. We are facing a winter in which nationwide curtailment will be *81% deeper* than last winter. We are besieged with petitions alleging that pro rata curtailment during this winter will wreak irreparable harm upon high priority customers. We are

burdened with petitions for extraordinary relief. We are told by Transco's own witness that the currently effective plan will not protect firm loads during the impending winter. As an alternative, we are not offered a fair and equitable curtailment plan, but a brokering scheme whereby customers with low contractual entitlements are at the mercy of those with higher entitlements. And when the wheel comes full circle, we have nothing but a Hobson's choice: Approve an unlawful plan, or disapprove it and allow the existing unlawful plan to continue in effect.

In defining the curtailment jurisdiction of this Commission,[22] the Supreme Court has reaffirmed the wisdom of its earlier decision in *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1941):

> Agencies * * * are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.

The circumstances of this case have been set forth above. It will suffice to say, at this juncture, that, unless our freedom to protect Transco's customers is restored, serious and irreparable harm will ensue.

The Commission finds; in addition to the foregoing; that:

(1) The proposed interim settlement agreement as to curtailment rules is unlawful, unjust, unreasonable, discriminatory and contrary to the public interest. Accordingly, it should be rejected.

[22] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

(2) The currently effective interim curtailment plan, being implemented pursuant to orders of the United States Court of Appeals for the District of Columbia Circuit, will not adequately protect high priority service on the Transco system during the impending winter.

(3) High priority customers on the Transco system will be exposed to serious and irreparable harm during the impending winter unless the Commission is free to permit the effectuation of the end use plan suspended by its order of July 30, 1973, and to take such further action as the public interest may require.

The Commission orders:

Transco's motion for approval of an interim settlement agreement as to curtailment rules is denied.

By the Commission. Commissioner Springer, concurring, filed a separate statement appended hereto.

Commissioner Brooke, dissenting, filed a separate statement appended hereto.

[SEAL]

KENNETH PLUMB,
Secretary.

TRANSCONTINENTAL GAS PIPE LINE CORP.

Docket No. RP72-99

(Issued November 12, 1974)

SPRINGER, Commissioner, *concurring*:

I concur in the denial of approval for the interim settlement agreement, but do not agree necessarily with the finding that the end use plan suspended on July 30, 1973, is the only solution for the Transco system.

/s/ William L. Springer
WILLIAM L. SPRINGER
Commissioner

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP72-99

(Issued November 12, 1974)

BROOKE, Commissioner, *dissenting*:

I have grave fear that Commission rejection of the proposed Interim Settlement Agreement (ISA), which represents a singular accomplishment arrived at through reasonable compromise and with remarkable unanimity among numerous and disparate parties, could well presage a calamitous situation on the Transco system this winter.

It may well be, as Transco observed in its reply comments on the proposal, that the broad support or non-opposition of virtually all parties reflects a belief that the 50 per cent pro-rata and 50 per cent end-use plan "will permit them to survive during the coming year." Use of the word "survive" is appropriate because the self-interest thread of "survival" is woven throughout comments to the settlement.

The ISA, by adjusting varying positions, interests and issues, eliminates the daily uncertainty of the old pro rata plan; recognizes the Commission policy set forth in Order No. 467-B; continues to provide a high degree of planning certitude available under the old interim plan; embodies a gradual and reasonable shift, under present circumstances, to end-use curtailment; provides stability in its emergency relief moratorium (a provision now of arguable value),

and assures distress compensation to severely curtailed distribution companies. The ISA would replace the present interim plan, to be effective from November 16, 1974, to November 15, 1975. It should be accepted by the Commission.

The proposal before us is a relatively simple document considering the gravity of Transco's system supply situation, which apparently has worsened since the ISA was filed with the Commission, but more comment on that later. Article II of the ISA states:

> "The general objective of the settlement curtailment procedures is to protect, within the limits of Transco's estimated available gas supply, natural gas service to essential high priority consumers while at the same time attempting to alleviate adverse economic, social and gas supply impacts on Transco's system resulting from projected curtailments. To this end, the agreed upon curtailment procedures provide for curtailment of Transco's share of the requirements of its larger firm customers initially on the basis of 50% pro-rata curtailment and 50% end-use curtailment in accordance with the Commission's Order No. 467-B set of priorities. However, certain exceptions have been made to this general method to provide, together with other available anticipated supplies, protection of service for residential and commercial requirements, storage injection requirements and essential firm industrial requirements. This latter category is defined as those industrial requirements dependent upon natural gas for feedstock, plant protection and process use which would not receive gas

> service from any source in the absence of the exception."

The agreement clearly indicates a movement by Transco and its customers away from the old pro-rata curtailment plan and toward the end-use format of Order No. 467-B (Order issued March 2, 1973). The diversity of the parties, each with various interests to protect, infers strong opposition to a straight 467-B program, and I deem it a mistake to ignore the recognition inherent in 467-B that reasonable and justifiable deviations would be permitted in curtailment programs.

Order No. 467-B commented (Page 3):

> "We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order 467 that the policy therein stated could, and would, be adjusted in appropriate cases where the hearing record so required."

The Commission later referred to "where deviation therefrom (Docket 469 policies) is required by the evidence." Order No. 467-B also acknowledged "general agreement" with the thesis "that a general rule is inappropriate and that each pipeline system should be treated on an individual basis." The Commission then stated a policy conclusion that end use, not contract entitlement, should be controlling. However, the policy should be applied reasonably and practicably.

In the more than 18 months since the end-use priorities of 467-B were enunciated, the nation's

natural gas supply situation has worsened and curtailments have deepened. Transco's supply shortfall has increased since the settlement was negotiated because on October 15, 1974, Transco customers were notified that the available gas supply during the 1974-75 settlement period would be about 20 Bcf less than the volumes used to compute the basic entitlements in Schedules 2 and 3 of the ISA.

It is apparent from comments that various parties regard this reduction in the volumes Transco estimated would be available for the 1974-75 settlement year as negating their obligation under Section V to refrain from filing petitions for extraordinary or emergency relief from the interim settlement. It was the intent of Article V that emergency relief would not be sought "except for changes in presently foreseen circumstance . . ." It is difficult to estimate how many relief petitions will be filed by accepting the settlement in the circumstances of this further erosion of Transco's supply, but rejection of the settlement, in my opinion, most assuredly will open the floodgates. The situation undoubtedly will be further exacerbated when the full impact of Commission rejection of the La Gloria Field settlement is measured, (*Hilda B. Weinert and Jane W. Blumberg et al*, Docket Nos. G-2730 *et al*, Order issued October —, 1974), an action to which I dissented.

Rejecting the ISA puts the Commission in the potential position of having to adjudicate a flood of petitions on an individual basis whereas its acceptance would have recognized that Transco and its

customers were making deep concessions in order to treat supply shortages on a system-wide basis and to render some meaningful stability through the moratorium. As it is, treating individual petitions as a "rob Peter to pay Paul" proposition can only lead to unmanageable administrative procedures, encourage protective filings, compel lengthy and costly litigation, and result in discrimination and gross inequities.

I have often criticized the regulatory delay which comes from wrapping administrative law in the trappings of a true court of law. I do not believe it the purpose of regulation to merely sanction managerial decisions, nor do I believe the regulatory scheme requires us to ignore the reality that people most involved frequently know better how to run their businesses than the FPC. If the solution conforms to the public interest, and has record support, we are foolish to turn it down, especially when extreme sacrifice is being made, as in this case.

The Commission Staff Counsel's comments of October 18, 1974, correctly delineated the Commission's court-prescribed options without reference to the possibility, although wholly improbable in my opinion, of a Commission-imposed plan based on the record within a reasonable time. I also concur in Staff's observation that the "Federal Power Commission regulates pipeline curtailments on a case-by-case basis and considers the supply-demand situation of each pipeline separately." (Staff Comments, Page 4) I would also agree that the Commission is without

authority to expropriate the supplies of one pipeline to benefit another, but I disagree with its statement of October 15, 1974, regarding the insufficiency of the record to support the tendered settlement.

Pennsylvania Gas and Water Company and North Penn Gas Company observed in its statement of October 18 that "the evidentiary support for the settlement exists in plentitude in the evidentiary record already compiled in the proceeding," and emphasized that "the settlement agreement was not developed until after the close of the record and is based on facts and principles fully explored in the record." If 6,000 pages of testimony and more than 100 exhibits do not provide a complete record then a complete record is impossible of compilation!

In its comments of October 18, Staff detailed operation of the present plan, due to expire on November 15, 1974, and concluded that its continued operation would not be in the public interest. However, Staff did give the new proposal its tentative support, conditioned "upon the representation of the parties that the gas volumes allocated by the ISA will provide protection for residential, commercial and essential industrial markets." Because of Transco's downward supply revision, Staff now opposes the interim settlement agreement as unprotective of high priority customers and urges the Commission to formulate an interim curtailment procedure based on end-use priorities.

The proposed settlement constitutes clear recognition that the many complex issues to be adjudicated

on their merits and supporting evidence could not be decided and a permanent curtailment plan determined prior to November 15, 1974. Thus, the parties turned to extensive negotiations to arrive at a further interim settlement which would, as equitably and as fairly as possible, allocate Transco's natural gas supply shortfall among all customers.

The State of North Carolina was particularly disturbed by the impact of any plan which required it "to bear a disproportionate share of what is clearly a national problem and will lead to unjustifiable discrimination against North Carolina's citizens and industries." (North Carolina's Comments, October 18, 1974; Pages 1-2) North Carolina is entirely dependent on Transco for its natural gas supplies, which imposes a somewhat peculiar curtailment situation which the State regards as discriminatory unless (1) account is taken of those Transco customers also supplied by other pipelines with less curtailment, and (1) the Commission "direct(s) the transfer of gas, at an appropriate rate, from pipelines with a more favorable supply" to those in deep distress. I, of course, do not believe the Natural Gas Act gives the Commission this power of supply allocation. Although it will be cut 39 per cent below contract entitlement during the settlement period, North Carolina regards the proposal as not an "unreasonable short-term compromise" with which "we are willing to attempt to live . . ." (North Carolina Comments, Page 2). North Carolina's position is especially disturbing and probably will become untenable should the reduction

in Transco's La Gloria volumes be significant. In that event, we can anticipate intolerably severe economic dislocation, affecting not only North Carolina, but all states stretching from South Carolina to New Jersey *even under the proposed interim settlement agreement with its 50-50 allocation arrangement.*

It is apparent from the responses that the present pro-rata plan has been equitable and fairly easy to implement in an effort to protect high-priority residential and commercial and other firm customers from curtailment, especially those wholly dependent on Transco. It is also equally evident that an Order No. 467-B curtailment would not be regarded as a Heaven-sent panacea. As a matter of fact, it probably would be bitterly opposed as being utterly disruptive. In view of this implication, I regard the 50-50 settlement proposal as a remarkable compromise which should be accepted as being in the public interest.

The potential impact of a 467-B plan, I conclude, probably formed the foundation for the compensation features in that end-use results in disproportionate curtailment among distributors with some having to absorb the economic losses attendant to loss of gas supply. It is a means to allocate the financial burden in the same manner curtailment allocates supply. Compensation payments are intended to further balance the equities, and is consistent with the principle of the 25-cent debit-credit surcharge accepted as Article IV, of the "order Approving Interim Settlement Agreement," issued November 15, 1972, and

still in effect. Virtually, all of Transco's customers, including those who will pay compensation, either support, or do not oppose, the payments provision as an essential ingredient of the compromise.

It would be premature to try to assess the full impact of Transco's deepened supply curtailments on the emergency relief moratorium provision, which makes a powerful contribution to the urgent need for stability and orderly management among all customers over the entire Transco system. While I regard the settlement as a good faith agreement requiring good faith compliance, I must concede the possibility that the moratorium provision may now be meaningless. If this assumption is correct, then it will be up to the Commission to view all petitions for emergency relief with more strictness than heretofore demonstrated.

In any event, the interim settlement agreement should be approved, pending prescription of a permanent curtailment plan for Transco. There is enough caution in the record before us to compel a searching look before imposing a flat 467-B program.

It appears that Transco is the victim of this Commission's inability to recognize a formula which can temporarily reallocate an inadequate supply of gas among customers with varying degrees of need equitably and without injury to individual rights of supply.

I am mindful that this is the 11th of November 1974 and that the history of this proceeding is long and tenuous. I am fearful of the consequences of con-

tinued litigation and I am aware of this Commission's demonstrated and legally frustrated inability to direct or encourage a harmonious agreement among Transco and its customers. This, in my opinion, is not the time for this Commission to say that it can't permit Transco either to continue its former interim settlement plan or to adopt its new settlement plan because both are illegal. We have been ordered by the Court of Appeals to do one or the other and it makes infinitely more sense to me to accede to the Court's alternative and accept at this time the new settlement agreement which is based on much more current data than the 3-year-old interim plan my colleagues would, in effect, have Transco resort to.

I am compelled to dissent to the decision reached by my colleagues. Unlike the reasons alleged for their decision I do not find that the opinion which they have reached is unlawful or discriminatory, but it is untimely, inappropriate and out of season.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Docket Nos. RP72-99; RP75-16-1; RP75-17-1; RP75-16-3; RP75-16-4; RP75-16-5

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(Eastern Shore Natural Gas Company)

EASTERN SHORE NATURAL GAS COMPANY
(Stauffer Chemical Company)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(South Jersey Gas Company)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(Union Gas Company—New Jersey Zinc)

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
(City of Linden, Alabama, *et al.*)

ORDER

GRANTING REHEARING IN PART, DENYING REHEARING IN PART, AND REQUIRING ENVIRONMENTAL IMPACT STATEMENT

(Issued January 10, 1975)

We grant rehearing in part of our order of November 12, 1974, in Docket No. RP72-99.

As a result of a recent order of the Court of Appeals for the District of Columbia Circuit, the settlement agreement filed with us in that docket on September 30, 1974, by the Transcontinental Gas Pipe Line Corporation is now in effect, providing an interim curtailment plan for Transco based essentially on 50% pro rata curtailment and 50% end use considerations. The compensation plan that is part of the settlement agreement, and about which we have expressed our misgivings, is also in effect, to the extent that the payments required pursuant to it are to be paid into an escrow account pending determination of the legality of the procedure. We shall speak further to these matters below, but will first place the rehearing applications now before us in context.

Background:

Our recital of the background of this proceeding can, for current purposes, commence with our order of November 12, 1974. The history of the case prior to that date is adequately summarized in that order. On November 12 a majority of the Commission concluded that an emergency exists on the Transco system, with a foreseen 20% curtailment of firm requirements during the 1974-75 winter season, and 28% on an annual basis; that such curtailment levels threaten Transco's customers with irreparable harm; that the then-effective interim curtailment plan, being based on pro rata contract curtailment, is contrary to

the public interest; and that Transco's settlement proposal of Sepember 30, based on 50% pro rata contract curtailment and 50% end use curtailment, is unlawful and should be rejected. We further stated that the compensation scheme that is a part of the settlement plan is unlawful because it would depart from cost-based rates, it would foster undue discrimination, it would circumvent section 4(d) of the Natural Gas Act, and it would involve potential violations of section 7(c). Finally, we expressed our continuing preference for the end use curtailment plan filed by Transco on June 29, 1973, the effectiveness of which was stayed by the Court of Appeals.

Following our November 12 order,

—Transco, on November 13 tendered for filing with us an interim curtailment plan that parallels in almost all particulars the plan it had filed on June 25, 1973. It, too, is based on end-use priorities. We gave notice of the Transco action the following day, and we invited comments on it. In the next several days we received comments or protests from approximately two dozen sources, most of which urged rejection of this latest plan.

—Eighteen applications for rehearing of our November 12 order were filed between November 13 and December 12.[1] Some of these applications under-

[1] Applications for rehearing of the November 12, 1974, order were filed by the General Motors Corporation and the Brick Institute of America, on November 13, 1974; the Consolidated Edison Company of New York, Inc., the Owens-Corning Fiberglass Corporation, and the Transcontinental

took to rebut the reasoning that led to our conclusion that the compensation plan is unlawful; several presented arguments as to the undesirability of an interim plan based essentially on end-use priorities; and almost all contended, in effect, that we should have accepted the Transco settlement plan of September 30, 1974.

—The Court of Appeals for the District of Columbia, on November 26, in *Consolidated Edision* v. *F.P.C.*, No. 73-1999, issued a further opinion concerning an interim curtailment plan for Transco. Following the filing of various motions by the petitioner, certain intervenors, and this Commission, the court in its opinion concluded that the then-effective pro rata curtailment plan should not be continued in

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Gas Pipe Line Corporation, on November 15, 1974; the City of Danville, Virginia, the City of New York, the Clinton Newberry Natural Gas Authority, the Elizabethtown Gas Company, the Long Island Lighting Company, the Piedmont Natural Gas Company, Inc., the Public Service Commission of the State of New York, and the Public Service Electric and Gas Company, on November 19, 1974; the Virginia Pipe Line Company on November 21, 1974; the Consolidated Gas Supply Corporation on November 25, 1974; and the Atlanta Gas Light Company on November 27, 1974. Our order of December 13, 1974, granted rehearing of the foregoing applications for purposes of further consideration. Applications for rehearing were filed on December 12, 1974, by the South Carolina Public Service Commission, the South Jersey Gas Company and the Eastern Shore Natural Gas Company, and the State of North Carolina and the North Carolina Utilities Commission. Our order of December 31, 1974, granted rehearing for purposes of further consideration to these December filings.

effect and that the end use plan, filed in June of 1973 and again on November 13 of this year, was also inadequate and unacceptable. The court placed in effect "the allocation scheme contained in the September 30, 1974, settlement agreement", pending further order of the court. As to the compensation scheme, the court accepted the suggestion advanced by several parties that "the FPC's objections could be met by placing funds in an escrow account pending a determination of the procedure's legality". The court also stated that

> Our present action in placing into operation the allocation plan contained in the settlement agreement in no way precludes the Commission from modifying the settlement plan or taking other action based on the information which it has generated and is peculiarly in a position to sift and evaluate.

And further, the court stated that the record compiled in this proceeding

> provides a valid basis on which the Commission, under the conditions which now confront Transco's customers, could issue interim orders effectuating a plan which does not comport with the one submitted by the pipeline.

But the court made clear that it would maintain continuing surveillance, and that any action by us would be effective only upon the court's approval.

From the foregoing quoted language, we understand that there has been restored to this Commission the authority vested in us by the Natural Gas Act,

particularly our curtailment authority contained in sections 4 and 5, so that we may prescribe an interim curtailment plan for Transco or modify the settlement plan now in effect—subject, of course, to such constraints as appear elsewhere in the court's opinion.

The Compensation Scheme:

We turn first to a further discussion of the compensation scheme. We remain of the view, expressed in our order of November 12, 1974, that it is unlawful.

The interim curtailment plan now in effect pursuant to the order of the Court of Appeals provides that those customers of Transco who are curtailed most heavily will receive compensation, and that such compensation will be paid by the Transco customers who are less heavily curtailed. More particularly, any Transco customer who is, under the settlement allocation plan, curtailed less than the system average, would pay a surcharge of 50 cents per Mcf for the gas he receives in excess of the system average. A customer who is curtailed more than the system average would, on the other hand, have credited to his bill 50 cents per Mcf for the gas he does not receive, up to the system average. Similarly, and in addition, a further 25 cents per Mcf surcharge is applied with respect to a customer who receives more gas than he would be entitled to under a curtailment plan based precisely on 50% pro rata contract curtailment and 50% end use curtailment under our Order No. 467-B. And, by the same token, a further 25 cents

credit would be allowed in connection with those receiving less than they would be entitled to receive under a 50-50 plan. Accordingly, a Transco customer with a high priority load could pay, in addition to the base rate, a 75 cents per Mcf surcharge for some of the gas he receives from Transco, and other Transco customers who are more heavily curtailed would be credited at the rate of 75 per Mcf for gas forgone. Transco would act in effect as the transfer agent.

We recognize that this Transco compensation scheme is designed to respond to the phenomenon of heavy curtailments by providing a kind of rough justice. Those customers most heavily curtailed would receive compensatory payments that would, to varying extents, reduce their burdens. But the justice that would thereby be provided is, we think, too rough. It is too rough to pass muster under the Natural Gas Act, and it is too rough for us to view as equitable.

Our November 12 order provides four bases for our conclusion that the Natural Gas Act does not permit this compensation scheme. Many parties dispute our conclusion and our reasoning—almost all of those who have filed applications for rehearing do so, and in addition, the legal question is discussed in many of the initial briefs and reply briefs filed on November 1 and November 25, respectively, in connection with a permanent curtailment plan for Transco. We thus have before us extensive arguments by the parties on the lawfulness of this kind of compensation

scheme. Some of the parties support our November 12 views on this subject; a greater number do not.

We said on November 12 that the compensation scheme is unlawful because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return" (p. 13). We continue to think so. Many parties point out that we have often departed from the view that rates must be strictly cost-based, as, for example, in connection with our optional procedure for the establishment of producers' rates. But we are and have been unwilling to prescribe rates or customer classifications that are unrelated to cost, and that is what we would have to do if we were to approve the Transco compensation scheme. The affidavit of Transco's Vice-President that accompanied the filing of the interim settlement makes clear that the 50 cents and 25 cents payments do not derive from any effort to establish cost consequences. These figures were plucked from the air, and their sole support stems from the fact that the private parties to this proceeding were largely willing to embrace them. To discover such figures, supported by so many, is not an inconsiderable achievement, but the achievement is not one that is countenanced by the Natural Gas Act. We have very recently been reminded by the Court of Appeals for the District of Columbia that "it is doubtful that non-cost factors can sustain a decision by the FPC which is unsupported by sound cost data". *Consumers Union* v. *F.P.C., et al.*, No. 73-1972 *et al.*, October 7,

1974. There is no allegation by any party that the compensation here involved is based on any cost data, or on any support whatsoever as to price level. In its absence, we cannot approve the plan.

In a further argument concerning this point, the South Jersey Gas Company and the Eastern Shore Natural Gas Company contend that we should not be troubled by the absence of cost support here, because we have approved penalties for overruns "without any mathematical calculation as to their impact" (Initial Brief, p. 15). But we think the analogy is a false one. We have indeed approved rather stiff penalties for unauthorized overruns (*United Gas Pipeline Company*, Opinion No. 671, issued October 31, 1973; *El Paso Natural Gas Company*, Opinion No. 697, issued June 14, 1974), but we were in such cases dealing with just that: *penalties* for *unauthorized* overruns. In Transco's case, on the other hand, the additional charges are not intended to constitute penalties or deterrents (although we think they would have that effect), and they would apply to gas that the customer is fully authorized to take.

Our November 12 order also concluded that the compensation scheme is objectionable because it would foster undue discrimination. We illustrated this conclusion with a hypothetical case showing that two companies, similarly situated except for their contract entitlements, would, with the compensation scheme in effect, pay widely disparate rates for the same quantity of gas. To the several parties who argue that the case is oversimplified, we would point

to the non-hypothetical case outlined in Philadelphia Gas Works' initial brief:

> . . . under the settlement proposal, PGW [Philadelphia Gas Works] in effect would be paying a *premium* of over 6 cents per Mcf for all Transco CD gas it received during the coming winter period, while Piedmont Natural Gas Company would receive a *discount* of over 7 cents per Mcf for all such gas it received during this period. The latter case would result from Piedmont's receipt of 50 cents per Mcf compensation for the approximately 2,800,000 Mcf difference between the volume it would receive under a pro-rata curtailment . . . and the volumes it would receive under the settlement. In addition, Piedmont would receive 75 cents per Mcf for the some 200,000 Mcf less gas it would receive under the settlement than under the 50% pro-rata—50% Order No. 467-B figures. The resulting payment of some $1,500,000 to Piedmont, applied to Piedmont's settlement entitlement of 20,140,000 Mcf, would reduce the rate, for Transco's deliveries to Piedmont, by over 7 cents per Mcf. In contrast, PGW would be forced to pay 50 cents per Mcf for the approximately 1,300,000 Mcf difference between pro-rata curtailment volumes and the 50% pro-rata—50% Order No. 467-B levels. In addition, PGW would be compelled to pay 75 cents per Mcf for the some 800,000 Mcf difference between the 50% pro-rata—50% Order No. 467-B level and the settlement level. The resulting $1,250,000 compensation liability, applied to PGW's settlement entitlement of approximately 20,000,000 Mcf, would increase PGW's cost of gas from Transco by over 6 cents per Mcf. Adjusting for zone differentials, Transco's rates would vary by 13 cents per Mcf for gas served to PGW and to Piedmont during the winter season. (p. 18)

To those who argue that the compensation scheme would work to eliminate discrimination, rather than to create it—on the ground that the consumer customers of one distributor ought not to pay rates that differ substantially from those paid by the same kind of consumer customers of another distributor, and compensation payments would tend to have an equalizing effect on their rates—our answer is two-fold. First, we are not empowered to fix rates for sales not subject to our jurisdiction, and such rates already differ greatly, depending upon a multitude of economic factors plus the varying views of State commissions. Additionally, the payments, unrelated to costs, losses, or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to be helpful to another, without visible regard to the question of how much helpfulness is actually needed. Indeed, the justice would be too rought.

Thirdly, we stated that the compensation scheme would circumvent section 4(d) of the Natural Gas Act, which bars rate changes in the absence of notice to the Commission and to the public. We now abandon this objection, to the extent that we earlier applied it to Transco itself. If the compensatory payments are suitably reflected in Transco's tariff filings, as we can presume (and we grant rehearing

below with respect to our earlier rejection of Transco's tariff sheets), then this objection seems to us no longer well taken. That is to say, if Transco's filed tariffs were to comply with the requirements of Section 154.63 of our Regulations and display fully the circumstances in which the additional 50¢ and 25¢ charges were to apply, then the requirements of section 4(d) and the Regulations thereunder would be met by Transco. Transco would not be required to refile each time such additional charges are to be collected, or abandoned. We are prepared to analogize the rate changes automatically arising from compensation payments and credits to those automatically arising from, for example, fuel adjustment clauses. We accept the latter, and if otherwise unobjectionable, we would also accept the former, if set forth in the pipeline's tariff.

But we remain of the view that the compensation scheme would involve circumvention of section 4 by Transco's customers. As we shall explain below, we think those customers who participate in the compensation scheme, under which some forgo gas and others acquire additional supplies in return for compensatory credits and payments, are engaging in sales subject to our jurisdiction. Natural gas companies that make jurisdictional sales must file their rates with us under section 4(a) of the Natural Gas Act, and they must file changes under section 4(d). In the absence of suitable rate filings by those Transco customers who make such jurisdictional sales pur-

suant to the compensation plan, such customers would engage in violations of section 4.

Finally, we objected to the compensation plan because, without more, it would involve the violation of section 7(c) of the Natural Gas Act. We stated:

> In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce . . . Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act . . . (p. 14)

We are now on uncharted ground and dogmatism is inappropriate, but we cannot escape the conclusion that the many parties here involved have, as a matter of law, arranged for future sales. The parties before us, and they are both numerous and just short of unanimous, negotiated and agreed to the settlement terms; they urged us to approve the settlement; they supported it before the Court of Appeals; and they now argue to us in favor of our acceptance of the compensation portion of it. Some of these parties have agreed to forgo gas so that others may have it —in return for compensation, or consideration, flowing to the former from the latter. The elements of a sale are present. Some tell us that no sales are involved because the transfers and compensation payments are involuntary, but we find this contention difficult to accept, because those who tell us so voluntarily support the settlement plan in all its aspects.

They have agreed to the deprivations, and the augmentations, under the settlement terms. We think, thus, that sales are involved.

We conclude that the compensation plan is unacceptable as a matter of law. We also conclude that it is unacceptable as a matter of policy because of its inherent inequity. It punishes customers with high priority loads, for they would pay more for gas to meet those loads; it provides credits to those with lower priority loads, without regard to whether their costs or losses are correlated in any way with the payments to be received. The scheme is, in our view, patently unfair to Transco's customers and to their customers, and we are unwilling to approve it.

Finally, we find that compensation schemes such as the one herein proposed are not consistent with the public interest. A compensation scheme that is tied to the full cost of alternate fuels rather than fifty cents per Mcf could not be distinguished in principle from the plan here at issue. In either case, the price that the high priority natural gas consumer would be required to pay moves closer to a "commodity" level with each increase in curtailment. Also, the "compensation" that is received by the curtailed customers would cause upward pressure on alternate fuel prices. The beneficiaries of the added cost and upward pressure would be the producers of oil and other fuels and not the producers of natural gas. Such a system would exacerbate the existing distortion in the relative incentives for exploration for oil and for natural gas and, consequently, de-

press natural gas exploration at a time when national policy should encourage maximization of that exploration. If the ultimate consumer is to be required to pay a price for natural gas that moves toward the commodity level, sound policy and common sense dictate that the rewards flowing from that price be bestowed for the production of natural gas and not for the production of alternate fuels through "compensation" schemes such as that herein proposed.

Inasmuch as our position on the compensation scheme is explicitly subject to review by the Court of Appeals, and thus notwithstanding our views as to its unlawfulness, the compensation scheme shall remain in effect as provided by the Court of Appeals, pending its further order.

The Allocation Scheme

Since the compensation scheme is unlawful, the settlement must be rejected *in toto*, without regard to the propriety of the allocation scheme.[2] Article X of the settlement provides:

> This agreement is made pursuant to Section 1.18(e) of the Commission's Rules of Practice and Procedure and, if it is not accepted in its

[2] Of course, Transco is free to submit a new setlement, without the unlawful compensation feature, in which case we would accord a full review on the merits consistent with our responsibility under *Michigan Consolidated Gas Company* v. *FPC*, 283 F.2d 204 (D.C. Cir.), *cert. denied* 364 U.S. 913 (1960).

entirety without condition, it shall be privileged and of no effect.

Thus, the currently effective allocation scheme shall continue in effect pursuant to the court's order, pending any future action by this Commission. In this regard, we are not prepared to say that the currently effective interim plan is sufficient to protect Transco's customers for even the remainder of the current winter heating season. Transco's supply situation continues to worsen, as indicated by the growing number of petitions for extraordinary relief,[3] and it may be necessary for the Commission to either modify the present interim plan or prescribe a new plan pursuant to our authority under section 5(a) of the Act.[4] Any further modification, however, will be made only if it is determined that the harm created by the currently effective plan is greater than the harm that would be inherent in a switch at mid-winter to a new plan.

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[3] We are consolidating for hearing the petitions for extraordinary relief from Transco's currently effective curtailment plan that have been filed in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-4, No. RP75-16-5, No. RP-75-16-6, No. RP75-16-7 and No. RP75-16-8. The consolidation of these petitions for hearing and decision will facilitate our assesment of the effect upon Transco's other customers that would arise if such petitions were granted.

[4] The State of North Carolina and its Utilities Commission filed with us on January 7, 1975, a document entitled "Petition of State of North Carolina and North Carolina Utilities Commission for Investigation of Transco's Supply Situation, for Extraordinary Relief from Curtailment, and for Immediate Relief Pendente Lite". We construe this filing as constituting a complaint under section 5(a) of the Natural Gas Act, and we shall give further attention to it by separate order at an early date.

The Staff Motion to Dismiss:

We shall also at this time deal with one further, recent development. On November 29, 1974, the Staff filed a motion asking us to dismiss six petitions for extraordinary relief that had been filed by certain of Transco's customers (in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-2, No. RP75-16-3, No. RP75-16-4, and No. RP75-16-5). The Staff argues that the settlement plan was represented to the Court of Appeals and accepted by it as one that would avoid irreparable harm; that the settlement agreement itself bars petitions for extraordinary relief in the absence of changed circumstances; and that the petitioners, in order to qualify for relief, must thus demonstrate a change in circumstances arising after November 21, 1974, on which date oral argument was heard by the Court of Appeals.

One of the foregoing petitions, that filed in Docket No. RP75-16-2, has been withdrawn. We approved the withdrawal in our order issued on December 19, 1974, but the petitioners therein have since renewed their request in a new docket, No. RP75-16-8. The petitioner in Docket No. RP75-16-3 filed for withdrawal on January 7. The remaining petitions have been the subject of recent orders, but all such petitions remain before us, either through applications for rehearing or through further requests for our

action. We shall, therefore, deal with the Staff motion of November 29 with respect to the dockets involved, without thereby intending to affect any of them in any manner except in connection with the Staff motion.

As to these cases, we think that the Staff motion offers an appealing logic, but we fear that we would be working an injustice if we were to treat of these cases collectively. The parties to these cases stand on different footings. While the representations made by any of them to the Court of Appeals will certainly be relevant to our subsequent determination of their needs, those representations are not parallel. For example, among the petitioners here involved, at least two were not parties to the proceeding then before the Court of Appeals (the Stauffer Chemical Company and the Eastern Shore Natural Gas Company), and at least one other (the South Jersey Gas Company) says that it expressly advised the court that notwithstanding implementation of the settlement plan, it would still require extraordinary relief. In the circumstances, it will be necessary for us to deal with these cases, and the representations made by the parties to them, on a case-by-case basis, when the proceedings are completed and the cases reach us for decision.

In addition, we are disinclined to read the Court of Appeals' decision of November 26 as barring petitions for extraordinary relief filed earlier. While the court did observe that

> Opponents of both the present [pro rata] plan and the 467 plan agree that the settlement will avoid irreparable harm (p. 20),

the court concluded its opinion by stating that

> Our order is not intended to restrict in any way the Commission's powers to respond to petitions for emergency or extraordinary relief from the curtailment plan placed in effect by this opinion (p. 24)

Accordingly, we will not ourselves restrict our powers to respond to the petitions now in question, and we will deny the Staff motion.

Compliance with NEPA:

In the meantime, proceedings concerning a permanent curtailment plan for Transco move forward. The extensive record has been closed, and as noted, initial and reply briefs have been filed. Once again, however, we have before us the question of compliance with the National Environmental Policy Act. The Presiding Administrative Law Judge on November 15 certified to us the following question:

> In view of the actions of the Courts of Appeals for the Fifth and District of Columbia Circuits in *Louisiana* v. *FPC* and *Consolidated Edison* v. *FPC*, respectively, should the staff of the Commission be required to prepare an environmental impact statement?

In *State of Louisiana* v. *F.P.C.*, No. 73-3478, the Court of Appeals for the Fifth Circuit on November

8, 1974, held that environmental impact statements are required in connection with permanent curtailment plans. Although the Court of Appeals for the District of Columbia has not announced a final decision on this point in the Consolidated Edison case, we are mindful of the views of the court recently expressed in *American Smelting and Refining Company* v. *F.P.C.*, 494 F.2d 925 (D.C. Cir., 1974). Accordingly, this proceeding must be reopened so that compliance with the requirements of the National Environmental Policy Act can be achieved.

This action will necessarily delay for some months our decision on a permanent curtailment plan. We would admonish the parties to proceed with reasonable dispatch, so that we can act on a permanent plan at least before the 1975-76 heating season commences. In connection with the preparation of an environmental impact statement by the Staff, we would of course expect Transco and other parties to this proceeding to cooperate by responding to data requests from the Staff. We would also call to the attention of the parties certain of the caveats offered by the Fifth Circuit: "We do not intend the impact statement requirements to be a weapon for disappointed parties"; the NEPA obligation "is imposed subject to a rule of reason"; this Commission "should not pour an inordinate amount of its resources into environmental forecasting"; but we must "make a good faith effort to comply". That we will surely do. Our Staff will be required to prepare an environ-

mental impact statement consistent with the court's opinion.

North Carolina Application for Rehearing:

Finally, the State of North Carolina and the North Carolina Utilities Commission applied for rehearing on December 2 in connection with our letter-order in this case of October 31. In that order we rejected the tariff sheets, intended to implement the September 30 settlement plan, that had been tendered by Transco on October 11. It is appropriate that rehearing be granted, but because Transco on November 27, 1974, again filed tariff sheets that implemented the settlement plan, which sheets we accepted in our order of December 31, 1974, no further action is required of us on this matter at this time.

The Commission finds:

(1) In light of the opinion of the Court of Appeals of the District of Columbia in *Consolidated Edison* v. *F.P.C.*, the settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, is now in effect, as of November 16, 1974. Payments made pursuant to the compensation plan will be handled as ordered by the court.

(2) The interim curtailment plan filed by Transco on November 13, 1974, should be rejected.

(3) The motion filed by the Staff Counsel on November 29, 1974, in Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5, should be denied.

(4) The issue of a permanent curtailment plan for Transco should be the subject of an environmental impact statement and, if any party desires cross-examination thereon, of reopened hearings before the Presiding Administrative Law Judge, so that the requirements of the National Environmental Policy Act, as construed in *State of Louisiana* v. *F.P.C.*, can be met.

(5) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, should be granted.

(6) The assignments of error and grounds for rehearing set forth in all other applications for rehearing filed in this proceeding, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, present no facts of legal principles that would warrant any change in or modification of the conclusion on such question contained in the order of November 12, 1974.

The Commission orders:

(A) The interim settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, shall be effective as of November 16, 1974, except that payments made pursuant to the compensation plan shall be handled as ordered by the court, pending further order of the court.

(B) The interim curtailment plan filed by Transco on November 13, 1974, is rejected.

(C) The proceeding, insofar as it relates to a permanent curtailment plan for Transco, is reopened so that all steps necessary may be taken to insure compliance with the National Environmental Policy Act, as construed in *State of Louisiana* v. *F.P.C.* The Final Environmental Impact Statement prepared by the Staff shall be made a part of the record, and if any party desires to conduct cross-examination thereon, an opportunity will be afforded. In that event, a further public hearing with respect to the Final Environmental Impact Statement shall be held before the Presiding Administrative Law Judge in Washington, D.C., commencing on such date as he may, in his discretion prescribe.

(D) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, is granted, as provided above.

(E) The Staff Motion filed on November 29, 1974, with respect to Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5 is denied.

(F) The applications for rehearing of the order of November 12, 1974, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, are denied.

By the Commission. Commissioner Brooke, concurring and dissenting in part, filed a separate statement appended hereto.

[SEAL]

KENNETH F. PLUMB,
Secretary.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP72-99

(Issued January 10, 1975)

BROOKE, Commissioner, *concurring and dissenting in part*:

I concur in that portion of the order which assigns an effective date of November 16, 1974, to the interim settlement plan; rejects the interim curtailment plan filed on November 13, 1974; denies Commission Staff motions to dismiss various extraordinary relief cases; directs preparation of an environmental impact statement, and grants North Carolina's application for rehearing.

My dissent is limited solely to the determination that the compensation procedure agreed to in settlemetn is unacceptable both as a matter of law and of policy. The Commission now abandons the argument that the compensation plan would circumvent Section 4(d) of the Natural Gas Act as it applies to Transco, a conclusion with which I agree, but holds that the transfer or relinquishment of gas pursuant to the settlement plan would be a violation of both Sections 4 and 7(c) by Transco's customers, unless sales certificates were otherwise obtained and appropriate rate filings made, a conclusion with which I disagree.

My opinion as to the lawfulness or appropriateness of such compensation features is set forth in my dissent to the order denying the interim settlement pro-

posal (*Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99, order issued November 12, 1974).

There is no dispute as to the facts, but the Commission followed a strange path in reaching its legal conclusion. Rather than affording the parties opportunity to brief the legal question of compensation prior to making a determination, the Commission abruptly surfaced its objections to the compensation procedure in its November 12 order. It now, in effect, regards the "extensive arguments by the parties" (Page 6, *supra*) as briefs on the legal issue and proceeds to reaffirm its prejudgment.

The interim settlement agreement represented a significant accomplishment among numerous Transco customers with diverse loads to allocate a dwindling pipeline gas supply on a split pro-rata, end-use schedule to protect essential and necessary loads. It was absolutely clear among all participants that some customers would be called on to surrender gas to other customers—and that the compensation plan for gas not received was simply an adjustment or offset to any economic dislocation occasioned by the allocation of volumes to protect high priority consumers. The Commission's strict adherence to cost-based rates is misplaced because the courts have bestowed considerable discretion upon the Commission in prescribing rates, dating back to the *Hope* case (*FPC* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944)) with its end result prescription, down to the *Moss* case (*John E. Moss et al* v. *Federal Power Commis-*

sion, No. 72-1837 *et al*, D.C. Circuit decided August 15, 1974), which held that market prices while not determinative, could be considered in setting just and reasonable rates.

The Commission's sudden concern over cost-based rates and the need for Sections 4 and 7 filings in emergency cases is rather curious. Certainly, it had no difficulty in formulating Section 2.68, Rules of Practice and Procedure, which provides that exempt entities (distributors and intrastate pipelines) can make temporary 60-day emergency sales and deliveries in interstate commerce "without any express authorization by the Federal Power Commission." The emergency nature of these sales also prompted a Commission conclusion that the "transporter should, of course, receive adequate compensation for any additional transportation services rendered" pursuant to Section 2.68. It further provides that upon termination of the emergency, the pipeline "shall inform the Commission, in writing, of the total amount of compensation received, if any, and the means by which the per Mcf compensation was derived." Since the compensation procedure is analogous to Section 2.68, the Commission's concern that the higher rates paid for exempt gas "are unrelated to a pipeline's cost of service plus reasonable rate of return" (Page 6) is misplaced.

It overlooks the fact that the transaction is between non-jurisdictional entities, that the pipeline is only the middleman transporter, and that the Commission would have legal review of the pipeline

rates in an appropriate rate case. Section 2.68 also provides for extensions beyond 60 days. Exemption of temporary acts and operations is also extended under Section 157.22, Regulations Under the Natural Gas Act, which states that the "public interest does not require the issuance of a certificate for the . . . sale of natural gas necessary to assure maintenance of adequate natural gas service where interruption or serious curtailment of service exists or is threatened . . ." Within 10 days, the Commission is to be advised of, *inter alia*, the rate schedule, contract or service agreement covering the sale involved. Similarly, Section 157.29 speaks of emergency 60-day sales by an independent producer without a Commission-issued certificate. Both, Sections 157.22 and 157.29 contemplate the possibility of such 60-day emergency sales' becoming of longer duration. These three emergency programs, sanctioned by the Commission and never appealed to the courts, stand as ample justification for the type of compensation program proposed by Transco and its customers. They have been of critical importance in attracting badly needed increments of new gas to the interstate market, and similar programs to allocate gas, rather than attract new gas, should not be rejected out of hand.

I agree that the justice of the compensation plan most likely will be rough (Page 8, *supra*), but it is difficult to determine who will be "roughed up" the most. Certainly those high-priority customers called on to pay higher prices will feel the pinch, and as-

suredly those lower priority users who relinquish gas may find the surcharge only of moderate benefit to offset loss of gas supply—but all parties, save one, agreed that such drastic steps were required to cushion gas and revenue loss at one end with gas gains and higher prices at the other. It is still significant that the settlement is strongly supported by many Transco customers who would be in far better shape under a straight 467-B end-use plan.

I cannot agree that Transco's compensation plan would punish high priority customers because they would pay more for receipt of additional gas and be unfair to those low priority users surrendering gas where little correlation exists between costs and losses with credits received. Nor can I agree that the surcharge plan is inconsistent with the public interest. The order states (Page 10) that the higher price occasioned by each increase in curtailment moves the market price closer to the "commodity" level.

I hope that my Colleagues are not overlooking the fact that one of the legacies of wellhead regulation of natural gas prices has been the creation of distorted patterns of fuels consumption in the United States—that regulated low rates aided and abetted grossly inefficient uses, discouraged development of the gas resource potential, dispersed drilling technology to the foreign areas, and, as we are now experiencing, inherited the declining productivity of old wells, curtailments and higher consumer prices.

The massive natural gas reserves existing a quarter of a century ago were moved into the interstate

system with little regard to their ultimate impact on the nation's basic energy sources of coal and oil. Rates were designed to supplant coal and oil in their traditional markets, and the efficiencies of high load factors were promoted to provide cheaper gas to the high-priority residential and commercial customers, even if it meant dumping off-peak gas under boilers at dime store rates to keep the lines full. Little thought was given to pricing gas on a value basis or whether it was the best fuel for the job, but I will not fault the past through hindsight. The critical energy crunch dictates that we conserve and make better use of our resources—gas, oil and coal—on the one hand while striving to develop our total resource base on the other.

It is probably true that those curtailed customers will exert pressure on alternate fuels, but I do not necessarily regard this as an evil. Price can be a very useful device in achieving a better allocation of fuel resources. It is very likely that we would have attained a far better pattern of energy consumption in this country had natural gas been permitted to establish a more realistic price, in relation to other fuels, through market forces. It is also very likely that consumer prices would be higher, whether or not a "commodity" rate, but this rate impact would have been accomplished gradually over a long period of time with a commensurate guarantee of more reliable supplies.

The search for gas is basically a search for hydrocarbons, with the search, if successful, yielding ei-

ther gas or oil or both. I do not see it likely that natural gas exploration will be depressed as the result of a Transco-type compensation plan, although I will not quibble with the Commission's view that such is a possibility. The Commission's Bureau of Natural Gas issued on January 2, 1975, a staff report which concluded that "from here on we must make do with less gas in absolute terms"—that it is no longer a question of supply playing catch-up with requirements. Making do with less gas is precisely what the settlement parties agreed to with the compensation feature serving to balance the equities.

The Commission has frequently commented on the desirable influence of marketplace competition and other market factors in determining appropriate natural gas rate levels. Now, it appears that one of the most important market factors, that of "commodity" pricing in relation to competitive fuels, is herein surfaced by the Commission as part of its rationale to negate the compensation procedure. Assuming such a position in this case on "commodity" rates could well be regarded as Commission precedent to prohibit the factor's consideration in future rate determinations.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Feb. 6, 1976, United States Court of Appeals for the District of Columbia Circuit, Robert A. Bonner, Clerk]

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC.
FARMERS CHEMICAL ASSO., INC.
GAS SECTION
GEORGIA MUNICIPAL ASSO.
MANUFACTURES INSTITUTE, INC.
STAUFFER CHEMICAL CO.
OWENS-CORNING FIBERGLAS CORP.
PUBLIC SERVICE CO. OF NORTH CAROLINA
THE BROOKLYN UNION GAS CO.
LONG ISLAND LIGHTING CO.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
PHILADELPHIA GAS WORKS
ALUMINUM CO. OF AMERICA
SOUTH JERSEY GAS CO.
ATLANTA GAS LIGHT CO.
PUBLIC SERVICE ELECTRIC AND GAS CO.
INTERVENORS

No. 75-1038

PIEDMONT NATURAL GAS COMPANY, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
AMERICAN TEXTILE MANUFACTURES INSTITUTE, INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
EASTERN SHORE GAS CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
ALUMINUM CO. OF AMERICA
PUBLIC SERVICE COMMISSION FOR THE
STATE OF NEW YORK
NORTH CAROLINA NATURAL GAS CO.
FARMERS CHEMICAL ASSO. INC.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1045

ELIZABETHTOWN GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
PIEDMONT NATURAL GAS CO. INC.
THE AMERICAN TEXTILE MANUFACTURING
INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC AND GAS CO.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA INC.
EASTERN SHORE GAS CO.
BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO. INC.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
NORTH CAROLINA GAS CORP.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1077

CONSOLIDATED GAS SUPPLY CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE
PIEDMONT NATURAL GAS CO.
AMERICAN TEXTILE MANUFACTURES INSTITUTE
OWENS-CORNING FIBERGLAS CORP.
SOUTH JERSEY GAS CO.
CONSOLIDATED EDISON CO., OF NEW YORK
GENERAL MOTORS CORP.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC & GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA
EASTERN SHORE NATURAL GAS CO.
THE BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
LONG ISLAND LIGHT CO.
INTERVENORS

No. 75-1099

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO. INC.
NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO. INC.
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
INTERVENORS

No. 75-1103

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO., INC.
LONG ISLAND LIGHTING CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
EASTERN SHORE NATURAL GAS CO.
SOUTH JERSEY GAS CO.
INTERVENORS

No. 75-1200

STATE OF NORTH CAROLINA AND NORTH CAROLINA
UTILITIES COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS COMPANY, INC.
FARMERS CHEMICAL ASSOC. CO.
EASTERN SHORE NATURAL GAS CO.
PHILADELPHIA GAS WORKS
SOUTH JERSEY GAS CO.
GENERAL MOTORS CORP.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE ELECTRIC AND GAS CORP.
CAROLINA PIPELINE COMPANY
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
OWENS-CORNING FIBERGLAS CORP.

Before: Bazelon, Chief Judge, * Edwards, United States Circuit Judge for the Sixth Circuit; and MacKinnon, Circuit Judge

ORDER

On consideration of the *per curiam* opinion of the Supreme Court of the United States granting the

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* Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

petition for certiorari, vacating the order of this Court, and remanding the case to this Court for further proceedings consistent with the Supreme Court's opinion, it is

ORDERED by the Court that the above cases are remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of the Supreme Court of the United States and the attached decision by this Court.

Per Curiam

Circuit Judge MacKinnon dissents for the reasons set forth in his attached statement.

PER CURIAM. On August 1, 1975, this court issued the following order in the above-styled case:

> On receipt and consideration of the briefs and record in the above-styled case; and upon consideration of the replies of the parties to this court's order of May 28, 1975, and to the order to show cause of this court entered on June 17, 1975;
>
> Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a servere curtailment of supply with consequent economic and financial hardship to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;
>
> Now, therefore, this court will hold in abeyance any decision upon the order of the Federal

> Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;
>
> And further, recognizing that time is of the essence, and for the reasons stated in the attached memorandum opinion, that said investigations and report to this Court be made within 30 days from the effective date of this order.

Thereafter the Commission petitioned The Supreme Court of the United States for a writ of certiorari. Subsequently, on January 19, 1976, the Supreme Court handed down a *per curiam* opinion granting the petition for certiorari, vacating the order of this court, and remanding the case to this court for further proceedings consistent with the Supreme Court's opinion.

The Supreme Court held that this court's order, to the extent that it prescribed for the agency "the methods, procedures, and time dimension of the needed inquiry and order[ed] the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency[,]" invaded the administrative domain.

The Court also, however, held:

> *Second.* We agree with the Court of Appeals that the existence of actual shortage of gas supplies forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1(b) of the Act, 15 U.S.C. 717b, to approve the curtailment of gas already contracted for. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Certainly that Court could properly conclude that the Commission would have abused its discretion had it approved curtailment plans in the absence of evidence whereby it "could have reasonably believed" the shortage to exist, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and that "substantial evidence" in the record is necessary to support any such finding by the Commission.

The Supreme Court also held:

> *Fourth.* We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that it was not, it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC* v. *Louisiana Power & Light Co.*, *supra.* Accordingly, the Court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Obedient to the views expressed by the Supreme Court, including its suggestion that "swift and priority consideration of this case" be given, we have considered whether or not on the partial record before us "the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to . . . decision" of the instant case. We conclude that it is, and hence this case is immediately remanded to the Commission for the required inquiry "in regard to the evidence of shortage."

We have noted with interest a case decided after the date of our preceding order and referred to in the Supreme Court's *per curiam* opinion without comment. *Mississippi Public Service Com'n* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975). In this case the Fifth Circuit held that contrary to the view expressed by the Federal Power Commission, the Commission did have jurisdiction "to effectuate relief of the type

sought in the petition for extraordinary relief." *Id.* at 1349. The relief sought in this Fifth Circuit case was a Federal Power Commission order to implement the same sort of proposal as is before us for high priority users who are scheduled to receive above average allotments of gas to compensate lower priority users who are allotted below average amounts of gas.

In our instant case, however, the Commission was presented with a negotiated agreement between higher priority users and lower priority users for the former to compensate the latter. This court has been urged by Transco and various of its distributing companies to find that the Commission's *disapproval* of this "voluntary agreement" is not supported by the record. We do not perceive how we could fairly consider "the lawfulness of the proposed compensation scheme" unless the Commission has first fulfilled its duty to determine whether a real shortage exists. Thus far the Commission has refused to certify the existence of the shortage claimed by Transco, and as far as our record shows, has not completed any investigation of its own.

While, of course, we are well aware that the Commission has disapproved this compensation scheme rather than approved it, we do not see how we can fairly weigh the legality of that decision unless the record contains a basis for our deciding whether or not the agreement was a truly voluntary response to an actual shortage. No such basis is provided absent the Commission's investigation of the shortage question and findings of fact on this issue which can be properly reviewed by this court.

For these reasons (to employ the words of the Supreme Court) we "immediately remand the case to the Commission for the required inquiry."

MacKINNON, *Circuit Judge*, dissenting: My views on this case were initially set forth in the memorandum accompanying the order of this court of August 1, 1975. We deal here with a *disapproval* by the Commission of a compensation scheme in a curtailment plan. If the Commission is affirmed by the court, then it is unnecessary to determine the existence or extent of a gas shortage because the compensation scheme is *invalid* on its face and it is not necessary to go further and determine the existence or extent of a gas shortage because such factual predicate is only necessary to a *valid* plan. It is true that if the record does not furnish the Commission with a basis for reasonably believing that a gas shortage exists or is imminent the Commission would not have authority to *approve* a curtailment plan but certainly the Commission can *disapprove* a compensation scheme in a curtailment plan submitted by the parties thereto when the scheme appears to be facially invalid and the existence of a shortage is not questioned by any party to the proceeding.

As to the substantive issue concerning the validity of the compensation scheme, it is my opinion that the Commission properly held the scheme to be an undue

discrimination prohibited by section 4(b) of the Natural Gas Act.

Under *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), curtailment plans are to be weighed against section 4(b) of the Natural Gas Act. This section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b). There is no question that the rates here are discriminatory; many natural gas rates are. The question is whether they are unduly discriminatory. Addressing this point, it is clear that under the settlement proposal Transco would charge different rates to similarly situated customers which rates were not the result of differences in Transco's cost of serving these customers. In actual operation, different rates would result from the varying degree to which each customer is curtailed and the degree of curtailment would be determined in part by the character of the use of the gas by the customer. Neither of these factors, degree of curtailment or nature of the use, is related to Transco's cost of service; but standing alone this is an insufficient ground upon

which to base a finding of illegality. The issue is whether the "difference in . . . charges, service . . . or in any other respect," based as it is on the non-pipeline costs specified in the settlement curtailment plan, is reasonable under the circumstances here present.

Under the proposed compensation scheme contained in the settlement curtailment plan it is obvious that high priority customers will be charged more for their gas and lower priority customers will pay less. Thus, the compensation plan would penalize high priority users for the benefit of low priority users, and in so doing would operate inconsistent with the approved objective of the Commission to base curtailment on end-use.[1] This inconsistency would result from the fact that the higher price required to be paid by high priority users would deter such priority customers from fully satisfying their needs and would thereby make the unused portion of their full entitlement to gas available for low priority users which in many instances is the more inefficient use. In any event it has been determined to be the lower *priority* use and favoring such low priority use, to the extent that the compensation scheme does, would frustrate and interfere with the operational scheme of the curtailment plan by interjecting factors that work against the principles upon which the plan is based.

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[1] FPC v. Louisiana Power & Light Co., 406 U.S. 621, 641-647 (1972); American Smelting & Refining Co. v. FPC, 161 U.S.App.D.C. 6, 17, 494 F.2d 925, 936, *cert. denied sub nom.* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974).

Upon such reasoning the Commission acted properly within its authority in rejecting the proposed compensation scheme.[2]

It is also significant that the record does not support any showing of compelling need to discriminate in favor of the low priority users who would benefit from the compensation scheme. The Commission noted:

> [T]he payments unrelated to costs, losses, or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to [be] helpful to another, without visible regard to the question of how much helpfulness is actually needed. (R. 11689)

It is accordingly my view that the settlement agreement was properly rejected because the compensation scheme constituted an undue discrimination in that it would maintain unreasonable differences in "charges, service, facilities [and] in other respect[s] . . . as between . . . classes of service" contra to section 4(b).[3] I would thus affirm the decision of the Commission. I see no necessity for getting into matters that are not necessary to determine the *invalidity* of the plan. Finding the plan invalid on one ground is sufficient. If it were to be found invalid because of an insufficient shortage, the resulting invalidity would not be changed in any way. I thus see

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[2] FPC v. Louisiana Power & Light Co., *supra* note 1, 406 U.S. at 646-47.

[3] *Id.*

no necessity for a remand. I would rule on the principal issue.

I thus respectfully dissent from the finding in the foregoing opinion that "the evidence regarding Transco's actual shortage . . . is absolutely essential to . . . decision" of the instant case.

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